CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 76

THE UNITED STATES OF AMERICA, PETITIONER

vs.

GENERAL MOTORS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 3, 1944
CERTIORARI GRANTED MAY 29, 1944

SUPREME COURT OF THE UNITED STATES

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1 [Caption omitted.]

2 In the District Court of the United States, Northern District of Illinois, Eastern Division

No. 48126

UNITED STATES OF AMERICA

vs.

93,673 SQUARE FEET OF FLOOR SPACE, MORE OR LESS, IN CHICAGO, COOK COUNTY, ILLINOIS, CLEARING INDUSTRIAL DISTRICT, INC., GENERAL MOTORS CORPORATION AND ARGONAUT REALTY DIVISION,

Petition for condemnation

Filed June 8, 1942

To the Honorable Judges of the District Court of the United States of America for the Northern District of Illinois:

Now comes the United States of America, petitioner herein, by its attorney, J. Albert Woll, United States Attorney for the Northern District of Illinois, at the direction of and on behalf of the Attorney General of the United States of America, pursuant to the request of the Secretary of War, and files this, its Petition for Condemnation herein, and represents unto the Court as follows:

I

That pursuant to the provisions of the Act of Congress, approved March 27, 1942, known as the Second War Powers Act, 1942 (Public Law 507, 77th Congress), the Secretary
3 of War is authorized to cause proceedings to be instituted to acquire by condemnation any temporary use of real property that shall be deemed necessary for military or other war purposes; such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal Statute and upon or after the filing of the condemnation petition, immediate possession of such real property may be taken, occupied, used and improved by the United States of America for the purposes contained in said Act.

II

That pursuant to the authority contained in said Act of Congress, the Secretary of War has requested the Attorney General of the United States to cause proceedings to be instituted in this Court to acquire, by condemnation, temporary use of the real

property hereinafter described and for an order directing the taking of immediate possession thereof.

III

That the Secretary of War has requested the condemnation of the use of the real property for a term of years ending June 30, 1943.

IV

That the real property, which the Secretary of War has deemed necessary to be acquired for military or other war purposes, is described as follows:

Premises known and described as 5001 West 65th and 6510–40 South Lavergne Avenue, comprising approximately 93,673 square feet of floor space, being the Westerly portion of the one story building located at the Southwest corner of 65th Street and Lavergne Avenue, Chicago, Illinois, and being that portion of said one story building not presently under lease to the United States.

4

V

That the names of the purported owners of said real property, or persons otherswise interested therein, who are made parties defendant hereto are:

Clearing Industrial District, Inc.
General Motors Corporation
Argonaut Realty Division.

Wherefore, your petitioner prays that this Honorable Court enter an order condemning the temporary use in the real property herein described, together with all improvements thereon and appurtenances thereunto belonging, and granting its right to take immediate possession, occupy, use, and improve said real property for military or other war purposes, and

Your petitioner further prays that process issue to the following persons, who are made parties defendant hereto, to appear before this Court on the first day of the next July term thereof, to be held in the United States Court House, in the City of Chicago, County of Cook, State of Illinois, and then and there respond to these condemnation proceedings: Clearing Industrial District, Inc.: General Motors Corporation, and Argonaut Realty Division, and

Your petitioner further prays that the compensation which your petitioner shall pay for the temporary use of the real property, together with all improvements thereon and appurtenances thereunto belonging, may be determined and ascertained according to law; and that your petitioner may have such further and

other relief in the premises as the nature of its case shall require and as to your Honors shall seem meet.

J. ALBERT WOLL,
J. Albert Woll,
United States Attorney.

5 In the District Court of the United States

[Caption—48126.]

Order granting possession

Entered June 8, 1942

This cause coming on to be heard upon the petition and motion of the United States of America, by J. Albert Woll, United States Attorney for the Northern District of Illinois, and it appearing to the Court that this proceeding has been instituted at the request of the Secretary of War, acting pursuant to the provisions of the Second War Powers Act, 1942 (Public Law 507, 77th Congress), and under direction of the Attorney General, and that Clearing Industrial District, Inc., General Motors Corporation, and Argonaut Realty Division, having been made parties defendant hereto, and the Court being fully advised in the premises.

It Is Ordered that the temporary use of the real property, together with all improvements thereon and apurtenances thereunto belonging, described as follows:

Premises known and described as 5001 West 65th Street and 6510—40 South Lavergne Avenue, comprising approximately 93,673 square feet of floor space, being the Westerly portion of the one story building located at the Southwest corner of 65th Street and Lavergne Avenue, Chicago, Illinois, and being that portion of said one story building not presently under lease to the United States.

for the term of years ending June 30, 1943, be and hereby is condemned and taken by the United States of America for military or other war purposes, and the United States of America, its duly authorized officers and employees shall have the right to take immediate possession, occupy, use and improve said real property, and

It is further ordered that the Marshal shall forthwith serve a copy of this order upon each of the defendants named herein and upon every person found to be in possession of or upon said property.

Entered at Chicago, Illinois, this 8th day of June, A. D. 1942.

IGOE, *Judge.*

6 The District Court of the United States

[Caption—48126.]

Summons and return

Filed June 22, 1942

The President of the United States of America to the Marshal of the Northern District of Illinois, Greeting:

We command you to summon:

Clearing Industrial District, Inc.; General Motors Corporation; and Argonaut Realty Division, if found in your district, to be and appear before our Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division, on the first day of the next July 1942 Term thereof, to be holden at Chicago, in the District aforesaid, on the first Monday of July next, to appear in response to the petition for the condemnation of certain real estate therein described, filed by the United States of America as Action 48126.

And have you then and there this writ.

Witness:

The Honorable Michael L. Igoe, Judge of the District Court of the United States of America, at Chicago, Illinois, this 10th day of June, in the year of our Lord One Thousand Nine Hundred and Forty-two, and of our Independence the One Hundred and Sixty-sixth year.

[SEAL] HOYT KING, *Clerk.*

J. ALBERT WOLL,
U. S. Attorney,
450 U. S. Court House, Chicago, Illinois.

Marshal's return

Served this writ on the within named Clearing Industrial District, Inc., a corporation, by delivering a copy thereof to H. R. Stevens, Secretary of said corporation, this 12th
7 day of June A. D. 1942. The President of said corporation not found in my district.

Served this writ on the within named General Motors Corporation, a corporation, by delivering a copy thereof to George L. Hay, Office Manager of Pontiac Motor Division of the General Motors Corporation, this 12th day of June A. D. 1942. The President of said corporation not found in my district.

Served this writ on the within named Argonaut Realty Division, by delivering a copy thereof to George L. Hay, Office Mana-

ger, of Pontiac Motor Division of the General Motors Corporation, this 12th day of June A. D. 1942. The President of Argonaut Realty Division not found in my district.

WILLIAM H. McDONNELL,
United States Marshal,
By WM. RAFF, *Deputy.*

3 Ser	6.00
In lieu	20
	6.20

In the District Court of the United States

[Caption—48126.]

Appearance

Filed June 30, 1942

We hereby enter the appearance of the defendant Clearing Industrial District, Inc., and that of ourselves as its attorneys in the above cause.

WINSTON, STRAWN & SHAW,
Attorneys for Defendant, Clearing Industrial District, Inc.

WALTER H. JACOBS, *Of Counsel.*

8 In the District Court of the United States

[Caption—48126.]

Appearance

Filed July 1, 1942

To HOYT KING,
Clerk of the Above Entitled Court.

SIR: Kindly enter my appearance in the above-entitled matter as the attorney for General Motors Corporation, Argonaut Realty Division, one of the Defendants named in the Summons served in connection with the above-entitled cause.

Dated June 30, 1942.

HENRY M. HOGAN,
Henry M. Hogan,
Attorney for General Motors Corporation, Argonaut Realty Division,
3044 West Grand Boulevard, Detroit, Michigan,
Trinity 2-4800.

HARRY S. BENJAMIN, JR.,
Harry S. Benjamin, Jr.,
Of Counsel.

To J. ALBERT WOLL and CLARENCE W. BEATTY, JR.,
Office of the United States Attorney,
450 U. S. Court House, Chicago, Illinois.

Please take notice that I have this 3[illegible] day of June 1942, entered my appearance in the above-entitled matter as the Attorney for General Motors Corporation, Argonaut Realty Division, one of the Defendants named in the Summons served in connec-
9 tion with the above-entitled cause. I request that copies of all pleadings, notices and papers hereafter filed in this matter be served upon me.

HENRY M. HOGAN,
Henry M. Hogan,
Attorney for General Motors Corporation, Argonaut Realty Division,
3044 West Grand Boulevard, Detroit, Michigan,
Trinity 2-4600.

HARRY S. BENJAMIN, JR.,
Harry S. Benjamin, Jr.,
Of Counsel.

In the District Court of the United States

[Caption—48126.]

Order re trial etc.

Entered Nov 23, 1942

On motion of defendants attorneys, it is ordered that this cause be and the same is hereby reset for trial on December 14, A. D. 1942, and it is further ordered that leave be and the same is hereby given Messrs. Preston Boyd and Morris I. Leibman to file herein their appearance as additional counsel for the defendant, General Motors Corporation.

10. In the District of the United States

[Caption—48126.]

Appearance

Filed Nov. 23, 1942

We hereby enter the appearance of Preston Boyden and Morris I. Leibman as additional attorneys for the defendant, General Motors Corporation.

Dated: November 23, 1942.

PRESTON BOYDEN,
MORRIS I. LEIBMAN.

In the District Court of the United States

[Caption—48126.]

Report of proceedings

Filed May 17, 1943

Proceedings had and evidence taken in the above-entitled cause before the Honorable Michael L. Igoe, one of the judges of said court, and a jury, in his courtroom in the United States Courthouse, at Chicago, Illinois, commencing on Thursday, January 21, A. D. 1943, at 10:00 o'clock a. m.

Present: Mr. J. Albert Woll, U. S. District Attorney, by Mr. Clarence W. Beatty, Jr., Special Asst. U. S. Attorney, appeared on behalf of plaintiff. Messrs. Taylor, Miller, Busch & Boyden, by Mr. Preston Boyden, and Mr. Harry Benjamin (Detroit, Michigan), appeared on behalf of defendant General Motors Corporation.

Whereupon the Plaintiff, to maintain the issues on its behalf, introduced the following evidence, to wit:

Colloquy

Mr. BEATTY. Will you mark this certified copy of a
11 letter and plat Government's Exhibit 1, and this photograph as Government's Exhibit 2, for identification.

(Said documents were marked accordingly by the reporter.)

Mr. BEATTY. If the Court please, I offer in evidence as Government's Exhibit 1 the certified copy of a letter from the Honorable Henry L. Stimson, Secretary of War, to the Attorney General, dated May 29, 1942, requesting the condemnation of a term of years ending June 30 of 93,673 square feet of floor space, more or less, in Cook County, Illinois, for use in connection with the establishment of a Signal Corps Depot in the General Motors Building, Chicago, Illinois, and the plat marked Exhibit B which is a part of the letter.

The COURT. Any objection?

Mr. BOYDEN. No objection.

The COURT. It may be admitted.

(Which said document, so offered and received in evidence, was marked "Government's Exhibit 1," and is in words and figures as follows, to wit:)

Mr. BEATTY. If your Honor please, by stipulation with Mr. Boyden, I offer a photograph marked "Government's Exhibit 2" in evidence.

Mr. BOYDEN. No objection.

The COURT. It may be admitted.

(Which said document, so offered and received in evidence, was marked "Government's Exhibit 2," and is in words and figures as follows, to wit:)

Mr. BEATTY. If your Honor please, I should like to read the letter marked "Government's Exhibit 2":

"The Honorable, The ATTORNEY GENERAL, *Washington, D. C.*

"DEAR MR. ATTORNEY GENERAL: It is necessary and advantageous to the interest of the United States that certain interests in lands located in Cook County, State of Illinois, be acquired by the United States of America for use in connection with the establishment of a signal corps depot in the General Motors Building, Chicago, Illinois.

"Therefore, pursuant to the provisions contained in the Act of Congress approved August 18, 1930 (26 Stat. 316), as
12 amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 516; 50 U. S. C. sec. 171), and March 27, 1942 (Public Law 507—77th Congress), which Acts authorize the acquisition of land for military or other war purposes, and the Act of Congress approved April 28, 1942 (Public Law 598—77th Congress), which Act appropriated funds for such purposes, it is requested that you cause the necessary proceedings to be instituted for the condemnation of a term of years ending June 30, 1943. The interests in land to be acquired comprise 93,673 square feet of floor space, more or less, situate in Cook County, Illinois, and are more particularly described in the inclosed Exhibit "A" and on the inclosed map entitled Exhibit "B." The names of the purported owners of said interests in land are set forth in the inclosed Exhibit "A."

"The Act of Congress approved April 28, 1942, supra, appropriated funds for this acquisition.

"The afore-mentioned interests in land are to be utilized to provide for additional storage space and the utmost haste in expediting this project is vital to the successful prosecution of the war. It is requested that pursuant to the provisions of the Act of Congress approved March 27, 1942 (Public Law 507—77th Congress), you procure an order granting immediate possession of the aforesaid lands.

"Appraisals are being obtained under the supervision of Lt. Col. F. I. Kennedy, Division Real Estate Director, Great Lakes Division, McCormick Building, 332 South Michigan Avenue, Chicago, Illinois, and the probable date of availability of the appraisal reports can be obtained by your field representative from the Divi-

sion Real Estate Director. No arrangements have been made by this Department for the procurement of title evidence.

"Inclosed herewith are two additional copies of Exhibit "A" and five additional copies of Exhibit "B."

"Sincerely yours,

(Signed) HENRY L. STIMSON.
Secretary of War."

Mr. Cutmore.

13 HARRY S. CUTMORE, called as a witness herein, on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. BEATTY:

Q. Will you please state your name, sir?

A. Harry S. Cutmore.

Q. Where do you live, Mr. Cutmore?

A. 4257 North Avers Avenue, Chicago.

Q. What is your business or profession?

A. I am an appraiser and valuation engineer.

Q. Where do you maintain your office, Mr. Cutmore?

A. In the First National Bank Building, Chicago.

Q. How long have you been an appraiser and valuation engineer?

A. Over twenty-five years.

Q. Are you a member of any associations of your profession?

A. Yes, sir; I am a member of the American Institute of Real Estate Appraisers, member of National Association of Real Estate Boards, Chicago Real Estate Board, The Society of Residential Appraisers, the Western Society of Engineers.

Q. Mr. Cutmore, have you held any official positions which called for appraisal work?

A. Yes, sir. In 1928 I was employed as the director of revaluation by Cook County to conduct a reassessment of all of the property in Cook County, and individual appraisals were made of all of the properties in Cook County under my direction. I was later Chief Deputy Assessor of Cook County. Under my direction the real estate assessment of 1935 was executed, that being the quadrennial year.

Q. Mr. Cutmore, are you acquainted with the property involved in this proceeding?

A. Yes, sir.

Q. That is located at 65th and Lavergne?

A. Yes, sir.

Q. Did you make an appraisal of that property?

A. I did, sir.

Q. Mr. Cutmore, have you written any articles about appraisal work?

14 A. Yes, sir; I have written some articles which were published in real estate magazines, and a few years ago the University of Chicago, in conjunction with the American Institute of Real Estate Appraisers, conducted a course on appraisal work and I assisted in the writing of the text material for that course.

Q. Will you tell the Court and jury some of the clients that you have made appraisals for in your experience?

A. Well, I have made appraisals for many purposes and for many different types of property. I have made them for banks in Chicago. Practically all of the leading banks have employed me at one time or another. Most of the leading legal firms have used my services at some time or other, and we have made appraisals of a great many large industrial properties such as International Harvester, Corn Products Refining Company, and a great many of them. We have also done work for the United States Government and State of Illinois for highway-acquisition purposes, and also for the Forest Preserve and Cook County Highway Departments.

Q. In those appraisals, I take it that the purpose for which they were made was to determine a fair, market value or fair cash market value of various properties?

A. Yes, sir.

Q. At the time of the inquiry?

A. Yes, sir.

Q. Do you know Mr. Preston Boyden, Mr. Cutmore?

A. Yes, sir; I do.

Q. Have you ever done any work for Mr. Boyden?

A. Yes, sir; I have done work for his law office.

Q. Do you know the firm of Winston, Strawn & Shaw?

A. Yes, sir.

Q. Have you ever done any work for them?

A. Yes, sir.

Q. Mr. Cutmore, will you tell the jury briefly and generally what you did in making the appraisal of the property involved in this proceeding?

A. Well, we made an appraisal of the entire property because it is one single large one-story building on an irregular shaped piece of ground. There is approximately 300,000 square feet of ground used for railroad tracks, and so on, outside of the building, which contains approximately two hundred and some thousand square feet. We made an appraisal of the entire property in order to be able to compute the fair rental value of

15 the west portion, or the 93,000-odd square feet that were mentioned to me.

Q. Mr. Cutmore, will you describe in your own language what this building comprises; the type of structure that it is?

A. Well, the building is a one-story warehouse-type building. It is built of brick, some steel, and wood frame construction. The two street elevations on Lavergne Avenue and 65th Street are face brick, and the rear walls are of common brick. There is a boiler room occupying approximately 2,000 square feet in the southwest corner of the building. It is very typical of the type building which comprise this Clearing Industrial District.

Q. Mr. Cutmore, have you ever had any occasion to appraise properties in the Clearing Industrial District?

A. Yes, sir; I have made many appraisals in that district for various people, including the—— .

Q. Have you had any occasion to appraise properties of like construction in and about this property?

A. Yes, sir.

Q. Do you have an opinion as to the fair-rental value of this 93,673 square feet for a period of one year such as is the term taken in this proceeding?

A. Yes, sir.

Q. Will you please tell the Court and jury what that option is in dollars and cents?

A. Well, my opinion is that the fair rental value of that 93,000 odd square feet is 35 cents a square foot, and 93,673 square feet would make that $32,785.55 per year.

Q. In making the appraisal of which you just stated your opinion as to the fair rental value of the property for one year, what elements did you take into consideration in arriving at that opinion, Mr. Cutmore?

A. Well, I have my notes here on the method of computation. I put a valuation on the land and allowed a six per cent return on the land investment, placed the valuation on the improvements and allowed an eight per cent return on the improvements. I allowed four per cent a year for depreciation, giving the building a twenty-five year life. We allowed for the heating cost, repairs and maintenance, taxes, insurance and management, which gave me a total sum for total operating costs, taxes, depreciation,
16 and a return on the investment, and computing the actual rentable floor space, the computation came out to 35 cents a square foot.

Q. Or a total of how much per annum?

A. $32,785.55.

Mr. BEATTY. You may cross-examine.

Cross-examination by Mr. BOYDEN:

Q. Mr. Cutmore, you made this appraisal, I think you call it——

A. Yes, sir.

Q. On behalf of the Government?

A. Yes, sir.

Q. You know, don't you, that the United States Government leased property in this same building at a price of 40 cents a square foot six months before they condemned this piece, don't you?

Mr. BEATTY. I object, your Honor.

The COURT. What is the objection?

Mr. BEATTY. On the ground that it is immaterial that the United States leased other property in this vicinity.

Mr. BOYDEN. It is in the same building.

The COURT. I take it he is trying to arrive at how this witness reached the figures he has given here in this testimony. That is the purpose of your question?

Mr. BOYDEN. That is right, your Honor.

The COURT. Objection overruled. You may answer that question.

Mr. BEATTY. Exception.

The WITNESS. Yes, sir; I knew that.

Mr. BOYDEN. Q. You knew that, and you are still willing to come into this court and say to this jury that you think 35 cents a square foot is a better price than the Government made for itself when they made the lease?

A. Well, I had no opportunity to appraise the other 40-cent figure. People sometimes make mistakes and pay too much. My computation indicates 35 cents is fair.

Q. Yes. Now, you say your computation is on the whole building?

A. Yes, sir.

Q. Don't you know that the lease the Government made at 40 cents was on part of that building?

A. Yes, sir.

Q. You do? You knew that much about it?

17 A. Yes.

Q. And you were told about this Government lease, you knew they had made a lease at 40 cents, didn't you?

A. Yes, sir.

Q. You knew they made that in December 1941?

A. Yes, sir.

Q. And you are testifying that in June 1942, I take it, which is six months later, you say it is only a figure of 35 cents, and that that is a fair rental value, is that right?

A. Yes, sir.

Q. Do you think that the rental value in that territory had diminished in the six months so there had been a change in the territory?

A. No; I think the territory remains very stable.

Q. If anything, rentals have gone up in that territory during that six months period, isn't that true?

A. They might have.

Q. Have you ever bought, sold, or leased any property in Clearing?

A. No, sir.

Q. Have you ever bought, sold, or leased a factory building anywhere?

A. I have never actually done that; no, sir.

Q. Have you ever built or owned a factory building?

A. No, sir.

Q. Will you tell me what is the building on the north of this property?

A. The building that adjoins it on the north?

Q. Yes.

A. Well, I would have to refer to my file. I can't keep all those things clear in my mind. I have a map on which we spotted the various adjoining properties.

Q. Do you know where Johnson & Johnson are located in that territory?

A. Yes, sir. They are quite close to there

Q. Would it affect your opinion—I understand you are giving an opinion here.

A. Yes, sir.

Q. Would it affect your opinion any if I told you that Johnson & Johnson have made a bona fide offer of 40 cents a square foot at the same time the Government entered into its lease of 40 cents a square foot on the whole property?

18 Mr. BEATTY. If your Honor please, I object to any offers. They are immaterial.

Mr. BOYDEN. There is no offer. I am asking if it would change his opinion.

Mr. BEATTY. As evidence of value?

The COURT. I understand all he has asked this witness is if it would change his opinion if certain other figures were offered for this property by somebody else. I think you may answer that question.

The WITNESS. No, sir; it would not.

Mr. BOYDEN. Q. Then you don't consider what people are willing to pay as a fair rental value as having any significance in your opinion?

A. Well, I might.

Q. You might, but you didn't, did you? You arrived at it, as you explained it here, is that correct?

A. Yes, sir; that is the way the computation came out.

Q. And you gave no effect to the fact that the Government itself was willing to pay 40 cents a square foot and had made a lease on that basis?

A. No, sir. As an appraiser I am constantly astonished at what people pay for some things.

Q. And it won't affect your opinion, it would not affect your opinion to learn that Johnson & Johnson in the neighborhood were offering 40 cents a square foot?

A. I don't believe it would.

Q. Would it affect your opinion any if you knew that what General Motors is paying Clearing on the entire building amounts to over 41 cents a square foot over the entire lease?

A. That wouldn't affect my opinion; no, sir.

Q. In the face of all those facts you still will come in and tell the jury you appraised this at 35 cents?

A. Yes, sir.

Q. So that what property in that neighborhood leases for is a matter of no concern to you in arriving at your valuation?

A. Yes; I had access to quite a bit of rental information. Most of the leases out there are made on a net basis——

Q. That is correct.

A. And I got a considerable amount of information and found that, generally speaking, the net leases were running around 23 cents a square foot, and I allowed 12 cents for the operation and, adding them together, made 35 cents, which confirmed the computation on the basis I used, which——

Q. Mr. Cutmore, did you make any inquiry as to General Motors was paying to Clearing in making your appraisal?

A. Yes, sir.

Q. And what did you find that to be?

A. 40 cents. Probably I didn't understand your question.

Q. I think not. I don't think you did. The 40-cent figure is what the Government is paying General Motors.

A. That is right.

Q. I want to know if you had made an inquiry as to what we are paying Clearing. That is a net lease, isn't it, you know that?

A. Yes; I knew it was a net lease.

Q. Yes; and did you make any inquiry as to what that net lease was costing us each year in terms of square feet?

A. I don't believe I remember it, if I did know it then.

Q. This is the building you are appraising, isn't it?

A. Yes, sir.

Q. Now, let us take these two parcels in this building, and I am afraid we are in some danger of confusing the jury here.

Is there a physical division of these two pieces, the 93,000 feet that is being condemned, and the 102,000 feet that we leased to them at 40 cents a foot, is there a physical division in the middle of the building?

A. No, sir.

Q. In other words, the two pieces run right into each other?

A. Yes, sir.

Q. And they are all part of the same floor space of this single building?

A. That is correct.

Q. Do you think then there is any difference between these two pieces, the 102,000 feet which is on the east, as I understand it, and the 93,000 feet, with respect to value? Is one of them more desirable than the other?

A. Well, no; the structure is one integral part, and any division that you make of it is more or less arbitrary. The building is a unit served by one heating plant.

Q. Exactly, but it is true, is not, that there is an inside track in the 93,000 feet, and there is not an inside track in the 102,000?

A. That is true; yes.

Q. It is true, isn't it, that the west tract, the 93,000, has loading docks, which the 102,000 does not have?

A. Yes, sir.

Q. And those figures, I take it, would tend to make the 93,000 square feet slightly more valuable than the other if you were going to make a distinction?

A. If you divide the tenancy, that would be definitely true; yes.

Q. Well, the Government did divide this tenancy and you are aware that they leased the least desirable portion here, the one without the loading dock and the inside track, at 40 cents a square foot, in December 1941? You know that, don't you?

A. Well, it was my understanding that they were to have access to their railroad siding, and the loading dock. There is also a loading dock on the south end of the property served by a railrad siding.

(Thereupon a short recess was taken.)

Mr. BOYDEN. Q. Mr. Cutmore, when did you make this appraisal?

A. In the early part of December of last year.

Q. For the purposes of this lawsuit, I take it?

A. I imagine so; yes, sir.

Q. Has there been any change in the character of this building between December 1941, when the Government leased 102,000 feet at 40 cents, and June of 1942, six months later, when they condemned the property, the 93,000 feet?

A. Do you mean any structural change?

Q. Any change in the character of the building?

A. No, sir.

Q. Well, any change at all. I don't want to limit you to that.

A. Well, there may have been some partitions rearranged. There was no essential change in the type of the structure.

Q. The building had not become less valuable in any way, had it?

A. No, sir.

Q. You say you made an appraisal, but you didn't go into what it cost General Motors to maintain their lease with Clearing?

A. No, sir; I made a valuation of the entire property and from that valuation deduced a square foot rental value for the entire structure.

Q. Without regard to what the space was leasing for, I understand?

A. That is right.

Q. Would it change your opinion any to know that in 1940 it cost General Motors $80,000 to service this lease, and in 1941, $79,800, and in 1942, $79,900?

A. It wouldn't change my opinion; no, sir.

Q. Mr. Cutmore, you said you arrived at certain valuations on the building and on the land; is that correct?

A. Yes, sir.

Q. You took a percentage of those?

A. Yes, sir.

Q. Then you spoke of various other items you allowed for?

A. Yes, sir.

Q. And that is on this building we are talking about, all of it?

A. Yes, sir.

Q. What did you allow for taxes, in dollars?

A. I think $3,000. I have it here. $3,000.

Q. And what did you allow for insurance?

A. 1,000.

Q. What did you allow for salaries and wages?

A. Well, I didn't break the thing down that way. I computed, for instance, heating cost at so much money.

Q. Well, I don't mean heat. I will come to that. You have no figure for salaries and wages as such?

A. No, sir; in making an appraisal of this type, from our study and case studies of a great many buildings we usually apply a square foot price for this type of building in arriving at an estimate.

Q. Oh, then, what you did was to take a figure by square foot, which would include all these things to service the building?

A. The repairs and maintenance were allowed, $4,500, part of which would be wages, and part of which would be replaced materials.

22 Q. What did you allow by way of amortization and depreciation?

A. Well, I figure the building to be worth $300,000. I allowed four per cent a year, $12,000 depreciation. That is not return on the investment. I allowed eight per cent there, or $24,000.

Q. What was your figure on the land, Mr. Cutmore?

A. $150,000.

Q. Do you think the Government should rent this property from General Motors for less than it cost them to pay Clearing?

Mr. BEATTY. If your Honor please, I object as to what Mister——

The COURT. Objection sustained.

Mr. BOYDEN. Q. Do you think the Government lease of 40 cents made by them in 1941, was too high?

Mr. BEATTY. If your Honor please, I object as to what Mr. Cutmore thinks about any goverment lease.

Mr. BOYDEN. He is an opinion witness.

The COURT. He may answer that question, as a real estate expert.

The WITNESS. Well, I don't know. You see, in a great many cases——

Mr. BOYDEN. Q. I see that.

A. You don't have an opportunity to appraise the negotiations. There might have been something else thrown in.

Q. In your investigation and appraisal in this case for the United States Government, didn't you go into what the Government itself did with respect to the property?

Mr. BEATTY. I object to that, because that lease is wholly immaterial to the issue. It is in the nature of a compromise because the Government has the power to take the property or to enter into a lease, and, for that reason, it is immaterial whether Mr. Cutmore inquired as to what the Government did or did not do.

Mr. BOYDEN. It is perfectly material as showing the background of this witness's knowledge.

The COURT. He may answer that question.

Mr. BOYDEN. Will you read the question?

(The last question was read by the reporter.)

Mr. BEATTY. I object to that.

The WITNESS. Yes, sir.

23 Mr. BOYDEN. Q. You did?

A. Yes, sir.

Q. And in making that investigation did you find that was what we call an arms-length deal?

A. Well, I found out in a very casual way from discussing the matter with various people who knew about it in a general way what had transpired in that negotiation. I wasn't there.

Q. No one told you that there was an element of force or compulsion by either party when the Government made this lease with the General Motors?

Mr. BEATTY. If your Honor please, I object on the ground that it is purely hearsay, as to what somebody may have told him, as to whether there was force or there was not any force.

The COURT. He said he made some private investigation. I think he may answer the question.

The WITNESS. Well, so far as I know, there was no force used on either side.

Mr. BOYDEN. That is all.

(Witness excused.)

Mr. BEATTY. The Government rests, your Honor.

Whereupon the plaintiff rested its case in chief.

The COURT. Do you want to proceed now or do you want to take your recess until two o'clock? Are you ready to go ahead now?

Mr. BOYDEN. I think we might as well recess until two.

The COURT. All right. We will go until two o'clock.

(Thereupon the further trial of the above-entitled case was recessed until 2:00 o'clock p. m. of the same day, Thursday, January 21, 1943.)

24 [Caption.]

THURSDAY, JANUARY 21, 1943,
2:00 o'clock p. m.

Trial resumed pursuant to recess.

Present: Same as before.

Whereupon the defendant General Motors Corporation, to maintain the issues on its behalf, introduced the following evidence:

Mr. BOYDEN. Your Honor, ordinarily I would start out with my General Motors witnesses, but I am going to call Mr. List of Chicago, because he has an engagement at 3:00 o'clock, and I want to let him go. I make that explanation because of his engagement. I did not know about it until noon today, so he put me out of gear a little.

Mr. List.

ERWIN H. LIST, called as a witness herein on behalf of the defendant General Motors Corporation, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. BOYDEN:

Q. Will you please state your name?

A. Erwin H. List.

Q. What is your business?

A. I am an industrial real estate broker.

Q. Practicing in Chicago?

A. Yes, sir.

Q. How long—how many years have you practiced here?

A. Twenty-one years.

Q. I suppose you have held the usual offices in real estate associations, and so on?

A. Yes.

Mr. BEATTY. I object, if your Honor please.

The WITNESS. I have been vice-president for two terms——

Mr. BEATTY. I object to what he was.

Mr. BOYDEN. I will strike the question.

The COURT. All right.

Mr. BOYDEN. Q. What offices have you held in the Chicago Real Estate groups?

A. I have been vice president of the Industrial Division for two terms, and I am now on my third two-year elected term as a member of the Industrial Appraisal Division of the Chicago Real Estate Board.

Q. Are you familiar with the property in Clearing that was occupied by General Motors and the 102,000 square feet of which they leased to the Government in December 1941?

A. Yes, I am.

Q. By the way, you don't know me? You never saw me before?

A. I never saw you before a half an hour ago.

Q. Were you or were you not asked by the Signal Corps of the United States to make an appraisal of the value; the rental value of that 102,000 square feet?

A. Yes, I was.

Q. Can you give me the approximate date that you were asked to make that appraisal?

A. Well, I was asked to make the appraisal about March 12, 1942, and I submitted it on March 13th, 1942.

Q. And just so that it is perfectly clear in the record, who asked you to make the appraisal?

A. Lieutenant Vardy, United States Engineer Corps.

Q. Will you tell this jury why he asked you to make the appraisal?

A. I understood that the lease could not be consummated until they had some corroborative evidence or substantiating evidence of the value of the lease which I understand is customary in Government leases.

Q. And am I correct in stating that lease was at 40 cents a square foot?

A. Yes, sir.

Q. Did you report to the Signal Corps, Mr. List, that result of your appraisal and your finding?

A. Yes, I did.

Q. In writing?

A. Yes, sir.

Q. Have you a copy with you——

A. Yes.

Q. Of the report you sent to the Signal Corps?

A. Yes, sir.

Mr. BOYDEN. May this be marked as Defendant's Exhibit 1 for identification?

(Said document was accordingly marked by the Reporter.)

Mr. BOYDEN. Q. And is Defendent's Exhibit 1 for identification a true and correct copy of what you sent the United States Signal Corps?

A. It is an identical carbon copy; yes.

Mr. BOYDEN. I offer it in evidence, your Honor.

Mr. BEATTY. If your Honor please, I object on the ground it is a copy and it is not the original.

The COURT. Unless it is better identified than it has been, the objection is sustained.

Mr BOYDEN. I will withdraw the offer of putting it in evidence.

Q. I will ask you, Mr. List, to tell the jury what you informed the Signal Corps as to the square foot value of the space involved?

Mr. BEATTY. If your Honor please, I object as to what Mr. List informed the Signal Corps. The report, if the original were offered, is the best evidence of what Mr. List may or may not have informed the Signal Corps.

Mr. BOYDEN. He wrote the letter, your Honor. Of course, we could subpoena the Signal Corps, as far as that goes. Have you got an officer around? But he wrote the letter, your Honor. It is clearly admissible.

The COURT. Are you trying to find out what he told them the value was or what he arrived as the value?

Mr. BOYDEN. Both, your Honor. Strike the question and I will go back and have him testify as to what he found.

Q. What did you find in your appraisal, Mr. List, that the square foot value of this space was?

Mr. BEATTY. I object to the form of the question. It purports to call for an opinion and it does not show that he is qualified.

The COURT. Do you dispute the fact that he is qualified?

Mr. BEATTY. Not as an appraiser, but what he found in some other appraisal. He may state in opinion form——

The COURT. Is it your objection that he is not qualified as an expert?

Mr. BEATTY. No, I will admit Mr. List's qualifications.

The COURT. Then what is your objection?

Mr. BOYDEN. You hired him.

The COURT. What is your objection?

27 Mr. BEATTY. I did not hire him.

The COURT. What is your objection?

Mr. BEATTY. The form of the question. He is calling for opinion evidence and he is not getting an opinion, first.

The COURT. Let us take it step by step. Did you have an opinion, Mr. Witness, at that time concerning the value of this leasehold in question?

The WITNESS. I had an opinion after I made my study.

Mr. BOYDEN. Q. Will you state what that opinion is?

Mr. BEATTY. May I ask this question? Is that with respect to the property that the Government leased, or this particular property, Mr. List?

The WITNESS. My report was on the property that the Government leased.

Mr. BEATTY. Objection as to any further questions with respect to the property that the Government leased, on the ground that it is not admissible in this case.

Mr. BOYDEN. The evidence is, your Honor, that this is part of the same building.

The COURT. I understand. He may answer that question.

Mr. BEATTY. Exception.

The WITNESS. I reported that in my opinion the space under the conditions at which it was offered was worth 43 cents a square foot.

Mr. BOYDEN. Q. And is and was that your opinion as to its worth?

A. Definitely.

Q. And did you have any opinion at that time, therefore, as to whether or not a lease at 40 cents a square foot was a fair lease?

A. I did. I thought it would be a very fair lease to the Government.

Q. Now, with respect to your qualifications, Mr. List, have you bought or sold or leased property in Clearing?

A. Yes, sir.

Q. Will you tell the jury a few examples of your experience in Clearing?

A. Well, during the past 15 years I have made not less than 12 and possibly 15, individual deals in Clearing, involving either the leasing of an existing building or the sale of a building or the negotiations which involved the erection of a building on vacant ground, and, in size, they ran all the way from 20,000 square feet to 150,000 square feet each.

28 Q. This opinion that you had, did you convey that the Signal Corps?

A. I wrote them a letter and expressed my opinion; yes.

Q. Substantially as you have testified to it here?

A. In more detail; yes.

Mr. BOYDEN. That is all.

Cross-examination by Mr. BEATTY:

Q. Mr. List, that is your opinion with respect to the other portion of this property, isn't it?

A. In respect to the part which the Government leased at that time; yes.

Q. Not with respect to the part that is under consideration in this case?

A. Well, it would apply equally well, if not more so, in this case, because the piece that was left at that time was the better part of the property, in my opinion.

Q. That includes heating and the ordinary services of looking after a building leased in that community?

A. That is right.

Mr. BEATTY. That is all.

Mr. BOYDEN. That is all.

(Witness excused.)

Mr. BOYDEN. Mr. Thorp.

CHARLES R. THORP, called as a witness herein on behalf of the defendant, General Motors Corporation, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. BOYDEN:

Q. State your name.

A. Charles R. Thorp.

Q. And where do you live, Mr. Thorp?

A. In Detroit.

Q. And what is your occupation?

A. I have charge of the Leasing Department of the General Motors Corporation.

Q. You are what?

A. I have charge of the Leasing Department of General Motors Corporation, real estate leasing.

29 Q. Are you familiar with the building in question in this case?

A. Yes, sir.

Q. The building in Clearing?

A. Yes, sir; thoroughly.

Q. Describe it briefly and generally.

A. Well, it is just slightly under 200,000 square feet, one floor with adequate truck loading facilities and very good railroad facilities, and particularly adaptable for storage because its roof supports have four-inch H-steel beams rather than the large columns, very efficient storage space and the loading facilities are at the floor level.

Q. I show you Defendant's Exhibit 2 for identification, which purports to be a lease between the Clearing Industrial District, Inc., and General Motors, and ask you if you are familiar with that document?

A. Thoroughly familiar with it. I have had to refer to it numerous times.

Mr. BOYDEN. The lease is executed, your Honor, and has the seal of both corporations on it. As I understand the Illinois law, that makes it admissible, so I now ask it be admitted in evidence.

The COURT. Any objection?

Mr. BEATTY. I object to it upon the ground and for the reason that the offer of the lease would indicate the consideration agreed upon at a date which is too remote to have any bearing on the issues involved in this case.

The COURT. How remote is it?

Mr. BEATTY. It is 1928 and it is in the nature of an offer of sale of the same property which is more than seven years past the present date.

The COURT. For what purpose do you offer the lease?

Mr. BOYDEN. Your Honor, this is the lease under which we are still paying——

The COURT. I understand, but is there an agreement to buy, too?

Mr. BOYDEN. No; nothing to do with the purchase at all. This is simply a lease which sets forth our obligation to Clearing. That is the obligation which has been condemned. It is an integral part of this case.

The COURT. There is not any dispute about that, is there?

Mr. BOYDEN. Of course not.

Mr. BEATTY. There is this proposition, that the consideration or the rent fixed in 1928, which is the primary purpose of introducing the lease——

Mr. BOYDEN. I did not state my purpose.

Mr. BEATTY. It is to show the obligation of General Motors under their contract with Clearing Industrial to lease the property in question, which is in the nature of an offer, as evidence of the sale which is more than seven years ago, which this property——

The COURT. I asked him that and he said there wasn't anything in there about sale.

Mr. BOYDEN. I don't know what he is talking about.

Mr. BEATTY. The consideration stated in the lease is definitely in there. As to the rights and liabilities between the Clearing Industrial District and General Motors, they have no bearing upon the question that the jury is called upon to decide, and that is, what is the present rental value or the rental value as of the date this proceeding was started, June 8, 1942, and the lease is dated in May or June 1928, which is more than seven years before the time of this——

Mr. BOYDEN. Perhaps I could clear it up, Judge, by pointing out that the only reason this suit is brought is because we have signed this lease, which is still in existence and does not expire until 1948. Our obligation to Clearing is one of the things this jury will have to consider.

Mr. BEATTY. That is not an issue in this case as between the Government and General Motors and Clearing.

Mr. BOYDEN. That is the lease they are condemning, and now he does not want it in evidence.

The COURT. How else do you have them in here except on that lease?

Mr. BEATTY. They are in here because of that lease——

The COURT. Yes.

Mr. BEATTY. Because they are a tenant, but the consideration stated in the lease is immaterial and incompetent and inadmissible as to the question of how much is the present rental value of this property.

Mr. BOYDEN. Certainly it is a fact for the jury to consider.

Mr. BEATTY. I beg to differ with you.

Mr. BOYDEN. The amount we are paying today as rental on that property is certainly evidence as to—may not be conclusive, but it is certainly good evidence as to the fair rental value, just as the rent they are paying on the other part of it is evi-

dence, or as the rental would be on a building next door. This happens to be the best evidence.

The COURT. Supposing they brought in experts who testified as to rentals of adjacent property as of the time the Government took this property, wouldn't that be competent evidence?

Mr. BEATTY. If the leases negotiated by these men were made within a reasonable time of the date of value in this case, I would say yes, your Honor. This is as though we were condemning the fee to this property and they brought in a sale made in 1928 and offered it as evidence of the value of the property at the present time.

The COURT. You are talking about a sale. You are talking about selling that space by way of lease.

Mr. BEATTY. Yes; they sold that space in 1928 at a stipulated rental. That stipulated rental is so remote to the date of value in this case that it hasn't any bearing and is not legally admissible in this case.

The COURT. I think there is some merit to that part of the objection. This is like if you had a real estate transaction back fourteen years ago. That would not be competent to show the value of this property as of today.

Mr. BOYDEN. This is what they call a net lease and the jury in this case is certainly entitled to consider the amount of rent we pay, not in 1928, but what we paid last year and the year before.

The COURT. Let him state the rent you paid last year.

Mr. BOYDEN. We are going to do that, but I have to put the lease in first.

The COURT. I sustain the objection as far as the introduction of the lease is concerned if it goes back to 1928.

Mr. BOYDEN. We are certainly entitled to put it in, being the document which is being condemned. It has a purpose in this case, hasn't it?

The COURT. It has a purpose, if that is the purpose, but that does not let you put it in for the purpose of showing what the terms of the lease were back in 1928. I think his point is good. You might as well attempt to show a transaction involving real estate in 1928, when you are attempting to show the value of a piece of property you sold last year. I do not think you would be permitted to go back that far.

Mr. BOYDEN. I think there would be force in that, but I say the jury in this case is entitled to consider what we pay, when they condemn this property, and what we are forced to pay Clearing while we are gone.

The COURT. You can testify to that before the jury.

Mr. BOYDEN. I am not offering this for the purpose he is objecting to it. But the orderly procedure is to put the lease in and I understood we would withdraw it as being a bulky document and then put in a summary and then I would have the witness testify to what you are talking about.

The COURT. If you would tell me what you agree to in advance, I would know as much about it as you. Neither the jury nor myself know anything about your agreement with Mr. Beatty.

Mr. BEATTY. I haven't had any agreement with you that you can put this lease in. My memory and recollection is that I specifically told you I could not agree.

The COURT. Testimony as to the present year and last year may go in, but I don't see any point to the whole lease. If you are going to withdraw the lease and put in a summary, you can cover the point.

Mr. BEATTY. I never agreed to the consideration being in here in this case at all. In fact, I talked with Washington about this whole thing and I told Mr. Boyden I couldn't agree with him on any point.

The COURT. That is quite apparent.

Mr. Boyden. So that there may be no misapprehension in your Honor's mind, my offer to prove and my order of proof is this: the lease is a net lease. It provides for the payment of so much and the maintenance. All Clearing leases are made that way.

The COURT. Yes.

Mr. BOYDEN. I was going to put the lease in, later to ask Mr. Thorp to characterize it with respect to its main terms, and then have testimony on the years 1940, 1941, and 1942, and certainly——

The COURT. If you will restrict the exhibit to that, all right.

Mr. BOYDEN. I will restrict it.

The COURT. But you are putting the whole lease in.

Mr. BOYDEN. But you have to start somewhere, Judge. The lease is an admissible document. It is the document under which we occupy the premises and which has been condemned. The lease does not mean anything without testimony on it.

33 The COURT. I understand.

Mr. BOYDEN. Because it is a net lease. There is nothing prejudicial to the Government in the terms of the lease. It is a net lease.

The COURT. If you are going to put it in the way you suggest you put it in, I don't see much objection.

Mr. BOYDEN. That is exactly the point. In other words, I will ask no question that will go into the field that he has objected to.

The COURT. And later on you will submit a summary and give that to the jury, as I understand it?

Mr. BOYDEN. Yes.

The COURT. Showing the terms of these years that you have just mentioned?

Mr. BOYDEN. That is right; exactly.

Defendant's Exhibit 3 for identification, will you mark this, please?

(Said document was accordingly marked by the Reporter.)

Mr. BOYDEN. Q. Will you look at Defendant's Exhibit 3 for identification and state what that is, if you know?

A. It is a very simple, short summary of the stipulations of the lease, as to rent and obligations.

Q. Was it prepared by you?

A. Yes, sir.

Q. Does it accurately state the facts that it contains?

A. To the best of my knowledge; yes, sir.

Mr. BOYDEN. I will offer that in evidence.

The COURT. What year does that cover?

Mr. BOYDEN. It refers to 1941.

The WITNESS. 1940, 1941, and 1942.

Mr. BOYDEN. 1940, 1941, and 1942. Your Honor has admitted Defendant's Exhibit 2, as I understand it, which is the lease.

The COURT. Yes, sir.

Mr. BEATTY. Is that excluding the consideration that is stipulated in that lease as of 1928?

The COURT. That is introduced on the terms that Mr. Boyden has mentioned, that he would submit a summary of it, showing the terms of the lease for the years, 1940, 1941, 1942, and 1943.

Mr. BOYDEN. Yes. I have got that right here. I am coming to that now, in fact. That is the next exhibit.

Mr. BEATTY. I would like to be clear about it. The con-
34 sideration stated in that lease is the thing that I am objecting to, to the terms of liability, because the consideration that is the rent obligated to be paid by General Motors to Clearing Industrial was made at a time that is too remote to be of any bearing on the question here of what the fair rental value of the property is.

The COURT. That is not mentioned in that summary, is it?

Mr. BEATTY. It is mentioned. Annual rental, so many dollars.

The COURT. For what years?

Mr. BEATTY. For the whole period.

The COURT. I thought you just said 1940, 1941, and 1942.

The WITNESS. It happens——

Mr. BOYDEN. Yes, it is.

Mr. BEATTY. This is limited here to that.

Mr. BOYDEN. It is limited, your Honor. What Mr. Beatty does not understand is that there is nothing in that lease that would be significant of 1928. Without further testimony you cannot read that lease and see what the cost is in 1928. The cost for all these items of maintenance and heating and light is not in evidence.

The COURT. Let us proceed with this lawsuit.

Mr. BEATTY. I object to the introduction of both the lease and the summary, your Honor, and take an exception.

The COURT. All right. They may go in under the terms suggested by Mr. Boyden.

(Which said documents, so offered and received in evidence, were marked "Defendant's Exhibits 2 and 3," respectively, and are in words and figures as follows, to wit:)

Mr. BOYDEN. Q. Mr. Thorp, this lease between Clearing and General Motors is still in effect, is it not?

A. Yes, sir.

Q. Have you, in your capacity as head of the real estate division of General Motors had prepared, in due course of business, and submitted to you the figures and facts with respect to the operation of this building under this lease for the year 1940, 1941, and 1942?

A. I did.

Mr. BOYDEN. Mark this "Defendant's Exhibit 4" for identification.

(Said document was marked accordingly by the reporter.)

35 Mr. BOYDEN. Q. I will show you Defendant's Exhibit 4 for identification and ask you if that summary is the summary which you had prepared.

A. That is the summary; yes, sir.

Q. And it was prepared by the real estate division operated under you, at your request?

A. The accounting department.

Q. Yes; the accounting department.

A. That is correct.

Q. Does that accurately state the figures for those years?

A. Yes, sir; and can be substantiated by our General Motors books.

The COURT. What years are those?

Mr. BOYDEN. 1940, 1941, and 1942. We haven't any data on 1943 yet. We only got the data on 1942 last night. I ask that this be introduced in evidence.

The COURT. Let Mr. Beatty see it first.

Mr. BEATTY. If the Court please, I would like to cross-examine this witness with respect to one or two of these items on here.

The COURT. Very well. You may do so.

Cross-examination by Mr. BEATTY:

Q. Mr. Thorp, the item "salaries and wages," that is the salaries and wages of people who cared for the property; is that correct?

A. That is absolutely correct. I verified that myself.

Q. And the item of "Materials and supplies," are those ordinary, in the course of maintenance?

A. Maintenance of the building.

Q. Of repairing windows, and so forth?

A. Yes, sir. I verified that.

Q. And the rent and house service is that the consideration under the lease from Clearing Industrial to General Motors?

A. The house service, part of it is just a very small item. You will find it is $261.00 for the year 1940. The rent consideration is fifty-four thousand some odd, $54,453, I think, to be exact, and you will find the house service. Just what that is I can't tell you, but it is such a small item.

Q. And that is the consideration that is fixed by this lease back in 1928?

36 A. The house service is fixed only by implication. That is, we pay Clearing a rental of $54,453.

Q. That is the rental fixed by this so-called net rental?

A. For the full twenty years.

Q. And that is the rental that was fixed in 1928?

A. Yes, sir.

Mr. BEATTY. If your Honor please, subject to the objection as to the admissibility of that item of rent paid to Clearing, commonly referred to here as net rental, which was fixed in 1928, I have no objection, but I do have an objection as to the introduction of that as evidence, because it has no bearing in the fair rental at the time of the taking of this property.

The COURT. Supposing they had a lease which was dated in 1940.

Mr. BEATTY. That would be a different story.

The COURT. But the terms of the rent payable in 1940 were fixed under a lease signed in 1928, and therefore, you say that makes it objectionable?

Mr. BEATTY. That is what I say, that it makes it objectionable, because it is identical with a sale of this property, selling the fee in 1928.

The COURT. But that is the only lease under which these people are in court today.

Mr. BEATTY. That is true.

The COURT. That is the only reason you are permitted to bring them in here.

Mr. BEATTY. That is the only reason they are in here.

The COURT. That is the only connection they have with the property.

Mr. BEATTY. That is the only connection they have with the property.

The COURT. As I understand, you call it a net lease, you pay so much per square foot, and over and above that you have to take care of the carrying charges yourself.

Mr. BOYDEN. Yes, maintenance, heat, light, power, taxes, insurance.

The COURT. But the net goes to the landlord.

Mr. BOYDEN. The net is the cash payment to the landlord; yes.

The COURT. Objection overruled. It may go in.

Mr. BEATTY. Exception.

(Which said document, so offered and received in evidence, was marked DEFENDANT'S EXHIBIT 4, and is in words and figures as follows, to-wit:).

37 Mr. BEATTY. Q. This Defendant's Exhibit 4, Mr. Thorp, shows——

The COURT. Except the one item of $200. He does not seem to know much about that, if you are seriously objecting——

Mr. Beatty. I am not objecting to that.

The COURT. Of course, he doesn't know so much about it.

Mr. BEATTY. What I am objecting to is the introduction of the consideration between General Motors and Clearing which was arrived at in 1928. The value of that property may be higher or may be lower in 1942 than the consideration that they obligated themselves to pay for twenty years.

The COURT. But this is the value that they and the landlord fixed upon at the time they signed the lease.

Mr. BEATTY. Yes; and that is in 1928.

The COURT. All right.

Direct examination (resumed) by Mr. BOYDEN:

Q. And this Exhibit 4, Mr. Thorp, shows that for the year 1940 the cost per square foot was 42.7 cents?

A. Yes, that is right, 42.7 cents per square foot.

Mr. BOYDEN. Q. And for the year 1941 it shows 41.9 cents.

A. 41.7; yes.

Q. And in 1942, which is the year that just passed, it shows this lease cost us 43.24 cents per square foot for rental?

A. Yes.

Q. And that is the money that we have paid Clearing, the landlord, for the last three years under the lease signed in 1928?

A. Plus what we paid elsewhere for maintenance and operating expenses.

Q. Well, under that lease itself?

A. Yes, sir.

Q. Mr. Thorp, did you handle the lease that has been referred to as the lease between the defendant and the Signal Corps of the Government, signed in December 1941?

A. Not personally; but it was under my direct supervision.

Q. It was under your direct supervision?

A. Yes, sir.

38 Mr. BOYDEN. Mark this "Defendant's Exhibit 5" for identification.

(Said document was accordingly marked by the reporter.)

Mr. BOYDEN. I ask that Defendant's Exhibit 5 be admitted in evidence, your Honor, being a properly executed document, under seal, signed by the Government and the defendant here, which leases in 1941, six months before this condemnation, the property in the same building as the space here condemned, and I urge, before my learned opponent gets a chance to speak, that when you have a lease of identical property, so identical it is the same building, made within six months of the time of the condemnation, that you are practically right on the nose, and when you add to that the fact that it was made between the same two parties, in which they set a value of the proper rental of the property, this lease is conclusive and there cannot be any question as to its admissibility.

Mr. BEATTY. If your Honor please, I want to object upon the ground and for the reasons that any lease between the Government and a party is in the nature of a compromise, especially where it is taken for the same purpose, and the courts have universally held that such settlements with persons or agencies with a power of eminent domain are not admissible as bearing on the question of value of the property. I should like to be heard on that, if your Honor wants.

Mr. BOYDEN. There is no testimony in the record, your Honor, that there was any compromise involved in this case. In fact, the only Government witness put on the stand testified he did not know of any duress or compromise. The record is that this was an arm-length negotiation, but I can ask this witness, Mr. Thorp, if he knows whether or not there was an element of compromise in this lease.

The WITNESS. Not to my knowledge.

The COURT. Suppose the jury retires a minute. I would like to see this law that Mr. Beatty is talking about.

(Here followed discussion, between Court and counsel, out of the presence and hearing of the jury.)

(Thereupon the following proceedings were had, in the presence and hearing of the jury in open court:)

Mr. BOYDEN. Then I take it Defendant's Exhibit 5, being this lease, is admitted.

39 The COURT. Yes.

Mr. BEATTY. I take it the exception is noted.

The COURT. Yes, sir.

(Which said document, so offered and received in evidence, was marked "Defendant's Exhibit 5" and is in words and figures as follows, to wit:)

Mr. BOYDEN. Will you mark "Defendant's Exhibit 6" for identification?

(Said document was accordingly marked by the reporter.)

The COURT. Do you have a summary of that?

Mr. BOYDEN. Yes, your Honor. I am trying to make this as easy as I can.

The COURT. Show that to Mr. Beatty.

Mr. BOYDEN. Q. I will show you Defendant's Exhibit 6 for identification and ask you what that is.

A. This is a very brief summary of the lease between General Motors and the Government, which you just entered as an exhibit.

Q. Prepared by you?

A. Prepared by me.

Q. From the terms of the lease?

A. Yes.

Q. You are familiar with those terms?

A. Yes, sir.

Mr. BOYDEN. I ask that it be admitted in evidence.

The COURT. It may go in.

(Which said document so offered and received in evidence, was marked "Defendant's Exhibit 6," and is in words and figures as follows, to wit:)

Mr. BOYDEN. Q. Mr. Thorp, without going into this lease in any detail, it is a fact, is it not, that this lease which has just been introduced in evidence calls for a square foot rental of 40 cents?

A. 40 cents; yes, sir.

Q. Will you describe generally and briefly the type of operation carried on in this 93,000 square feet, by General Motors?

A. Well, it was a replacement parts point, and what we call master warehouse for Buick, Oldsmobile, Pontiac, and Chevrolet parts, to replace quickly for the dealers and car owners those essential parts to keep their automobiles running.

Q. Will you describe any special building facilities which helped this type of operation in this property?

40 Mr. BEATTY. If your Honor, please, I object to the question upon the ground and for the reason that it is a description of the business carried on by General Motors at this location, which

does not have any bearing on the question involved in this issue, and it is immaterial, irrelevant, and incompetent.

The COURT. What is the reason for this question?

Mr. BOYDEN. The last question, your Honor, was to describe any building facilities which helped this operation. It goes to the value of the building when it was condemned. It was condemned as a going distributing point or master warehouse, and I will show this building had a special value in that connection, and there cannot be anything irrelevant about it.

The COURT. You may answer the question.

Mr. BEATTY. Exception.

The WITNESS. The building had particular value for the operation, from the fact that it is one-story and had the necessary truck and rail facilities to efficiently handle the products in and out of the building.

Mr. BEATTY. If your Honor please, I move to strike that, as that is definitely a statement of the General Motors business at this particular location. It is immaterial, irrelevant and incompetent and has no bearing on the rental value of this property.

Mr. BOYDEN. Your Honor, it is fundamental that the best use is the use to which we are entitled to it, and all we are doing here is showing that this building had special facilities for doing our type of work and that justifies the rental we are claiming, and, as a matter of fact, the rental we are paying. That is all that is for.

The COURT. What difference does it make what use you are putting the building to them? You are paying for the rental. That is what you are going to attempt to prove here.

Mr. BOYDEN. Yes.

The COURT. You are going to attempt to prove what the value of the space was.

Mr. BOYDEN. We have proved that.

The COURT. Then what difference does it make what you use it for?

Mr. BOYDEN. Because of the operation there, and our operation goes to the question of the damage that was done by the condemnation, by having to move out. I am entitled to show——

41 The COURT. Oh, then I will sustain the objection. The answer will be stricken out.

Mr. BOYDEN. Q. You are familiar with this building and this Government lease that was made under your jurisdiction?

A. Yes, sir.

Q. Have you an opinion as to whether or not the terms of that Government lease, being Defendant's Exhibit 5, fairly represent the fair rental value of the space leased?

A. Why, most certainly, in view of our actual cost being in excess of what we asked the Government. In fact, we figure we are making a very fair lease with the Government.

Q. And is it your opinion and is it still your opinion that it is a fair lease?

A. Definitely.

Q. Have you an opinion as to the fair market value per square foot of that leasehold in June 1942, on an open market without giving any consideration to expenses of moving or damages to the corporation because of the condemnation or any factors except only the fair rental value per square foot, to a customer seeking a lease?

A. Well, I should say somewhere in the neighborhood of 42 cents, which is our actual cost of maintaining, of having and maintaining and operating the building, as shown by the previous evidence submitted.

Q. Did you have any negotiations with respect to space in this building in the month of December 1941 with——

A. Yes, sir.

Q. Any party except the Government?

A. Yes, sir.

Q. With whom did you have those negotiations?

A. Johnson & Johnson.

Q. Who are Johnson & Johnson?

A. Well, there are a nationally known concern who have a building right close to the Buick building there in Clearing, the one that is under consideration here. They have a rather large building of their own. I don't know whether it is rented or owned by them, but it is very close to this building that is under condemnation.

Q. Did they make you an offer?

A. Yes, sir.

Q. Do you know of your own knowledge what they offered to rent that space from you at?

A. Yes, sir; they offered——

42 Mr. BEATTY. I object, upon the ground and for the reason that an offer made by another party is inadmissible an incompetent in this hearing, and I submit Sharp v. The United States, 191 U. S.

The COURT. Sustain the objection.

Mr. BOYDEN. Q. Mr. Thorp, something was said this morning by a witness, Mr. Cutmore, to the effect that this 93,000 square feet and this 102,000 square feet were not divided. Is that a correct statement or not?

A. Not entirely so. There is a cinder block fire wall that separates the two pieces of space.

Q. In other words, they are physically set apart from each other?

A. Yes; an eight inch cinder block wall.

Q. And when was that put in, if you remember?

A. That was put in approximately at the time the parts operation went in there, which I think was in 1933.

Q. You have introduced an exhibit showing what it cost us to operate that lease last year. Are you able to compute what the loss to General Motors would be if there was a finding of a 35 cent square foot value here?

Mr. BEATTY. If your Honor please, I object upon the ground and for the reason that the loss of cost of operation under this lease is immaterial and irrelevant and has no bearing upon the value of this property——

The COURT. If you will make a short objection I will sustain it.

Mr. BEATTY. Objection.

Mr. BOYDEN. That is all, Mr. Thorp.

Cross-examination by Mr. BEATTY (resumed):

Q. Mr. Thorp, you base your opinion of the 42 cents upon computing the cost of operating this property and including the rent fixed under the lease negotiated in 1928, isn't that true?

A. Yes, sir.

Mr. BEATTY. That is all.

Redirect examination by Mr. BOYDEN:

Q. Mr. Thorp, you are taking other factors into consideration, in addition to our cost of that——

A. His question was that I was taking the rent established in 1928, which I must say is true. That lease rental
43 was established when the lease was made. However, that does obtain until the expiration of our lease in 1948; that same rental.

Q. I know, but I am asking you now if you do not take other factors into consideration?

A. Yes, sir; I do. I take all of our cost factors in connection with that building.

Q. And your knowledge of other leases on similar property?

A. I don't know that I just understand the question.

Q. Your knowledge of the Government's lease; you also take that into consideration?

A. Oh, definitely.

Mr. BOYDEN. That is all.

Mr. BEATTY. If your Honor please, I move to strike the testimony of this witness with respect to the opinion of value because it is based on an element that is too remote *of* the date of valuation that is in question here, and by that I mean the valuation of the rental, of the net rental to Clearing District, fixed in 1928, and the rental that is to be fixed is as of June 8, 1942.

The COURT. That is practically the same objection we had before.

Mr. BEATTY. Yes.

The COURT. There will be practically the same ruling.

Mr. BOYDEN. That is all, Mr. Thorp.

Mr. BEATTY. I take it, your Honor, then the objection is overruled?

The COURT. Yes, sir.

Mr. BEATTY. Exception.

Mr. BOYDEN. Mr. Benjamin, who comes from Detroit, asked me if I want to suggest to your Honor that I might want to recall him, in view of subsequent testimony. I understand we always have that right.

The COURT. Yes, sir.

Mr. BOYDEN. In fact, I will now call Mr. List for one question, if I may.

The COURT. All right. I thought he had a three o'clock appointment.

Mr. BOYDEN. That is what he said, but Mr. Hunter grabbed him and asked if I would put him on quickly for one question. Will you take the stand, Mr. List?

44 ERWIN H. LIST resumed the stand and testified further as follows:

Direct examination (resumed) by Mr. BOYDEN:

Q. You are the same Mr. List who just testified here before?

A. Yes, sir.

Q. Have you made a lease of space, similar space, in Clearing within the last thirty days?

A. Yes, sir; I have.

Q. Where was that space located, Mr. List?

A. It was located in the west end of Clearing District, about two miles from this property, further away from Chicago. Do you want me to describe it?

Q. Is the property comparable to this property?

A. Yes. It was a one-story building served by the same railroad and having a trucking facility comparable to this building. It has practically no office space, but in other phases, that is, the

construtcion, the approximate ceiling height and the window construction and thing of that sort——

Q. Would you say it was more or less valuable space than the space in this building?

A. Well, it would depend. To a small company it might be more valuable. To a large company is might be less valuable. It is just a smaller unit of space.

Q. Will you tell this jury what the square foot rental was in that transaction you made in the last thirty days?

A. The rental was 39 cents per square foot, and had to furnish his own heat and all other operating facilities.

Q. When you add heat to the 39 cents, have you an opinion as to what that would result in by way of a square foot figure?

Mr. BEATTY. I object to that. It is a pure computation.

Mr. BOYDEN. It is a question of opinion, of a real estate man.

The COURT. Does he know what the other figures are?

The WITNESS. You asked me only in respect to the heat and there are so many buildings in clearing that they have the heat factor reduced to a fairly constant accurate amount, which is 4 cents per square foot.

45 Mr. BOYDEN. I think that clearly makes his testimony competent.

The COURT. All you have to do is add 4 cents to the other figure, and the jury can do that.

Mr. BOYDEN. Yes.

Q. And that would come to a figure of 43 cents, with heat?

A. With their heat expense; yes.

Mr. BOYDEN. That is all, Mr. List.

Mr. BEATTY. That is all.

(Witness excused.)

Mr. BOYDEN. Mr. Essex.

CHARLES ESSEX, called as a witness herein on behalf of the defendant, General Motors Corporation, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. BOYDEN:

Q. Will you state your name, please?

A. Charles Essex.

Q. Where do you live, Mr. Essex?

A. In Detroit.

Q. And by whom are you employed?

A. General Motors, specifically; Chevrolet.

Q. Describe your position with them, Mr. Essex.

A. I am Manager of the Parts Warehouse operations, nationally, covering 38 warehouses scattered from Los Angeles to Seat-

tle, Portland, Maine to Jacksonville, Florida, serving Buick, Oldsmobile, Pontiac, Chevrolet, dealers with Buick, Oldsmobile, Pontiac, and Chevrolet parts.

Q. How long have you had that position?

A. This particular position since 1937.

Q. And before that you were working in this same division.

A. For ten years.

Q. In your capacity as manager, did you have charge of the Clearing central terminal here we are talking about?

A. That is right, sir.

Q. Will you describe the type of operations carried on in this building?

46 *Colloquy*

Mr. Beatty. If your Honor please, I object as to the type of operations carried on by General Motors in conducting their business from this point.

The Court. What is the reason for this line of questions?

Mr. Boyden. Now, I think we have come to this question at last. The only way that I can bring in damage to the jury is to explain to them what we did out there, what we had out there, and then show them what we were forced to do with it and why we had to spend the money. Now we come to the question of damage to our property.

The Court. Then we might as well let the jury retire and we will argue that question out now.

Mr. Boyden. I think so.

The Court. We are right on head into it.

Mr. Boyden. Yes; we are right there now.

The Court. All right. Let us take the jury out to their room.

Mr. Boyden. I am all through with valuation.

(The following proceedings were had out of the presence and hearing of the jury:)

The Court. Is this a question of damage?

Mr. Boyden. A question of expense of moving, damage to the property, but limited only, your Honor, to those items of dollars spent. We are not asking and could not under the cases, I am sure——

The Court. The damage in connection with your having to move?

Mr. Boyden. We are not asking for any profit, because our business was interrupted; nothing speculative.

The Court. I understand.

Mr. Boyden. Just dollars spent.

The Court. The case you are talking about is Miller, the one that just came down?

Mr. BEATTY. Yes, your Honor.

The COURT. January 4th?

Mr. BEATTY. Have you got a copy of the decision?

The COURT. Yes, sir.

Mr. BOYDEN. This is my witness. Whom do you wish to open?

The COURT. Well, you are offering the proof. It has to do with the expense connected with your moving. All right.

Mr. BOYDEN. An expense connected with the moving, and, in addition, damage. What we are offering to prove, as tabulated in schedules, is this:

47 You need not take this for us, unless somebody wants it; unless your Honor feels there is value to it.

(Thereupon counsel for both sides argued, off the record.)

The COURT. This produces a very peculiar situation, and evidently it is hard law, but I do not know what I can do except to follow the law. In this very latest case of the United States against Miller, decided by the Supreme Court January 4th of this year, they very distinctly say that questions of substantive rights, such as the measure of compensation, are grounded upon the Constitution of the United States, so that pretty nearly eliminates these Illinois cases.

Mr. BOYDEN. It does not, however, your Honor, state what the substantive law is, nor does the whole opinion attempt to say it. We are just as much in the dark as we ever were.

The COURT. It says it is grounded on the Constitution of the United States. That is where your theory of compensation comes from.

Mr. BOYDEN. Yes; just compensation.

The COURT. Just compensation; they shan't take your property without giving you just compensation.

Mr. BOYDEN. And "just compensation" has been judicially described as making a man whole.

The COURT. I think this decision means they are going to take the decisions of the United States Courts rather than the courts of the different States.

Mr. BOYDEN. Well, in the District Court in Pennsylvania there is a decision which gives these special damages. That was the case of——

The COURT. That is in Pennsylvania. Under what law?

Mr. BOYDEN. Federal law, Judge. What I read you is 275 Fed.

The COURT. The only thing novel about your case, as you have stated it, and as I understand it, is that you have to move twice. If you only had to move once, you admit the law is as the Government contends it is.

Mr. BOYDEN. No. I cannot admit that is good law.

The COURT. Let's see here. Here is this case of 284 Federal.

Mr. BOYDEN. What is the name of that case, Judge?

The COURT. Gershon vs. United States.

Mr. BOYDEN. Oh, yes. That case seems to hold there is
48 no question about it where you have to move once, the lease was extinguished.

The COURT. They go further than that. They say the law charged the plaintiff with notice that it was subject to be deprived of the use of these premises by the exercise of the power of eminent domain, the inconvenience and expense incident to vacating the premises upon the expiration of the right at any time not being proper subjects in determining the just compensation to be paid by the party acquiring it.

Mr. BOYDEN. Yes. Obviously, the reason for that is because they would have that same expense and inconvenience later.

The COURT. They don't say that. They say the Government has a superior right.

Mr. BOYDEN. We are not contesting the Government's right.

The COURT. They are entitled to come in and exercise that right, and the inconvenience and expense on the part of the tenants in vacating are not recoverable.

Then there is this other case of Potomac Electric Power against United States.

In view of that law, I am forced to sustain the objection of the Government, so far as that line of testimony is concerned.

(Thereupon a short recess was taken.)

(The following proceedings were had in open court, in the presence and hearing of the jury:)

Mr. BOYDEN. Judge, I take it, under your ruling, the next order of business would be an offer of proof, to make our record.

The COURT. Yes.

Mr. BOYDEN. And that will take some little time. Of course, that won't be in the presence of the jury.

The COURT. Have you some other evidence we can finish up with the jury by 4:30, and then you can read the offer in?

Mr. BOYDEN. We have no other evidence, your Honor, on valuation.

The COURT. That would conclude your case, then?

Mr. BOYDEN. That would conclude the case. That is all the valuation. The offer of proof goes to the cost of removal and the damage to property.

The COURT. The jury may as well be excused until
49 tomorrow morning, and then you can read your offer of proof into the record.

Mr. BOYDEN. That is right.

The COURT. The jury may go until ten o'clock tomorrow morning.

(The following proceedings were had out of the presence and hearing of the jury:)

Defendant's offer of proof

Mr. BOYDEN. Defendant offers to prove by Mr. Charles Essex that defendant had at the premises in Clearing installed equipment in the amount of approximately $101,000, consisting of bins and other facilities for a central distributing point; that it had at said location an inventory of parts and machinery of approximately $250,000; that the premises were condemned about June 8, 1942; that about June 16th, Captain Gilpatrick of the Signal Corps told Mr. Essex that he had to get out in three or four days or he would move him out with soldiers; that thereafter Mr. Essex closed the operation of the plant and for the next five weeks relocated his property, demolished the bins and other personal property in the warehouse, hired men to complete the moving and bought all necessary supplies and paid all necessary freight bills to complete the operation of putting the building in shape for the government and in relocating the inventory as well as that part of the equipment which was not destroyed, in other plants and locations throughout the country.

Does your Honor believe there is merit in numbering your offers of proof?

The COURT. In numbering them?

Mr. BOYDEN. Yes. I don't suppose there really is, except for identification.

The COURT. Just for identification. I don't know what advantage there is to it.

Mr. BOYDEN. Defendant further offers to prove by Mr. Essex and by Mr. John Kearns, of the Accounting Department in Detroit, that the defendant, in the due course of business, segregated all items of expense and damage attributable solely to the operation of moving as the result of the condemnation, and that all these records were kept separate and apart from the other company expenses and gathered together in the defendant's main office in Detroit.

Defendant further offers to prove by these same witnesses and by the original records of defendant, the following:

50

1. That between the period of January 22, 1942, and July 31, 1942, the defendant paid the sum of $2,338.85 in salaries to employees engaged solely and exclusively upon the business of completing the job of moving and in demolishing the building so that the mov-

ing could be accomplished; that these men were engaged in the clerical work to keep track of the operations; that these men were not engaged in any other work for the company;

2. That the defendant was forced to pay out the sum of $3,472.33 to employees by way of separation and vacation allowance payments; that these were payments to which employees were automatically entitled by virtue of the company's policy when they left the company's employ through no fault of their own; that none of these men have since been rehired by defendant and that said payment represents a complete loss to defendant; that said men would not have been discharged if the said premises at Clearing had not been condemned;

3. That the defendant expended the sum of $1,360.44 for salaries to seven central office employees; that it was necessary to transfer to Clearing in Chicago from Detroit in Michigan, these employees in order to dispose of the equipment and inventory; that none of these men did any regular routine work for the company during the period for which they were paid the above sum of money; that these men were necessary to complete the work of moving and demolition as insisted upon by the Signal Corps;

4. That the defendant expended the sum of $14,011.27 for wages paid to labor at Clearing, beginning with the week ending June 27th through August 15th; that this sum represents the pay roll of the labor at Clearing necessary physically to accomplish the work of moving and demolition and putting the plant in shape to turn over to the Government;

5. That the defendant expended the sum of $829.75 for wages of janitors and watchmen in the Clearing plant for the period from June 20th to August 15th; that this sum was paid for the protection of the Signal Corps and to protect and police the property while it was in the process of demolition and of being moved from the Clearing plant;

51 6. That the defendant expended the sum of $1,566.15 which represented the cost of labor used to unload, check, and put away certain service parts and accessories which had to be shipped from Clearing to Janesville, Wisconsin, because of the condemnation;

7. That the defendant expended the sum of $16.75 representing the cost of labor to unload, check, and put away accessories shipped from Clearing to Minneapolis, Minnesota, as was made necessary by the condemnation;

8. That the defendant expended the sum of $3,728.69 as the cost of labor used to unload, check, and put away service parts and accessories shipped from Clearing to Saginaw, Michigan;

that the shipment of these parts was made necessary by the condemnation;

9. That the defendant expended the sum of $95.76 as the cost of labor used to receive, check, and put away service parts shipped by Clearing to Kansas City, as was made necessary by the condemnation;

10. That the defendant expended the sum of $432.00 as the cost of labor to perform the same operation described in number 9 above for parts shipped from Clearing to Oldsmobile at Lansing, Michigan;

11. That the defendant expended the sum of $1,369.40 as the cost of labor for the operation described in offer number 9 hereof on parts shipped from Clearing to Flint, Michigan, as was made necessary by the condemnation;

12. That the defendant expended the sum of $572.15 for cost of labor to perform the operation above described in offer number 9 for parts shipped from Clearing to Pontiac, Michigan, as was made necessary by the condemnation;

13. That the defendant expended the sum of $825.69, which represented state unemployment tax, Federal unemployment tax, and Federal old age benefit tax, upon the salaries and wages paid to men engaged solely in the work of demolition and moving and relocation of the property, all as made necessary by the condemnation. That in addition to said $825.69, defendant expended $293.42, in connection with the lay-off benefit plan of two per cent, which is in force by defendant; that this relates solely to money spent on clearing the premises for the Government, for the Army.

14. That the defendant expended the sum of $1,490.04 by way of expense paid to executives and employees for work done
52 solely in connection with the demolition and moving and relocating at Clearing, made necessary by the condemnation; that this item of expense account is applicable to the men employed by the Detroit office in this connection;

15. That the defendant expended the sum of $280.70 for the purposes described in offer number 14, applicable to employees brought from Janesville, Wisconsin, to Clearing to work solely on the job of moving;

16. That the defendant expended the sum of $830.13 for labor at its Chevrolet plant in unloading fixed assets shipped from Clearing to Dowagias, Michigan, which shipment was made necessary by the condemnation;

17. That the defendant expended the sum of $2,331.17 in purchasing shipping supplies, tools, and services used in packing and shipping the parts and accessories from Clearing, and dis-

mantling and shipping bin equipment and fixed assets—all made necessary by the condemnation;

18. That the defendant expended the sum of $205.63 for the purchase of supplies and services incidental to leaving the building in good condition for occupation by the Signal Corps;

19. That defendant expended the sum of $355.81 in telephone and telegraph charges incidental to arranging shipping destination for clearing the service parts and accessories located at Clearing; that this expense was directly attributable to the condemnation;

20. That the defendant expended the sum of $2,264.77 by way of use of shipping supplies in that amount presently at Clearing warehouse, which supplies were used to ship the parts and equipment aforesaid;

21. (Omitted):

22. That the defendant paid, by way of freight on stationery shipped from Clearing to Detroit the sum of $13.85;

23. That defendant paid the sum of $2,713.57, by way of freight on fixed assets shipped from Clearing to Dowagiac, Michigan, all as made necessary by the condemnation;

24. That defendant paid the sum of $4.10 for freight on stationery shipped from Clearing to Flint, Michigan;

25. That defendant paid the sum of $1,003.03 by way of freight on parts and accessories shipped from Clearing to Janesville, all as made necessary by the condemnation;

53 26. That defendant paid the sum of $1,622.22, by way of freight on parts and accessories shipped from Clearing to Saginaw, Michigan, as made necessary by the condemnation;

27. That defendant paid the sum of $533.99 by way of freight on service parts shipped to Oldsmobile Division from Clearing, as made necessary by the condemnation;

28. That defendant paid the sum of $1,119.76 by way of freight on service parts and accessories shipped from Clearing to the Buick Division, as made necessary by the condemnation;

29. That defendant paid the sum of $687.31, by way of freight on parts shipped from Clearing to Pontiac Division, as made necessary by the condemnation;

30. That defendant paid the sum of $232.69, by way of freight on supplies shipped from Clearing to Janesville, as made necessary by the condemnation;

31. That defendant paid the sum of $1,614.07 by virtue of the condemnation, which amount results from the payment by defendant of the installation costs and service charges in connection with the installment and operation of a burglar system under contract with the Illinois District Telegraph Company; that said

system had to be dismantled and that said sum represents the unamortized installation costs and certain rentals which had to be paid by virtue of the contract which defendant had with the Telegraph Company.

In connection with all the offers of proof from 1 to 31, inclusive, hereinabove made, the defendant offers to prove that it has in court the original documents and vouchers necessary to support said offers.

32. That defendant offers to prove that it has incurred a rental expense of $5,250.00, for rental on premises at Dowagiac, Michigan, for the purpose of storing the fixed assets which had to be removed from Clearing by virtue of the condemnation, which sum represents rental for the period expiring June 30, 1943, which is the same date as the Government condemnation expires;

33. That defendant offers to prove, through expert testimony of company officials, that it has lost a sum of $30,062.90 by virtue of the condemnation, made up as follows:

The sum of $5,062.90, being the value of bin equipment destroyed when the removal was carried out, and

54 The sum of $25,000, being the total of installation, labor, and freight costs on fixed assets lost as a result of dismantling the entire plant at Clearing.

Defendant offers to prove that all of the above expenditures and losses were reasonable expenditures and the direct results of the condemnation, and that none of them are traceable to the performance of any of the defendant's routine business. Defendant further offers to prove that at the time of vacating the property because of the condemnation it was necessary to ship equipment and parts to the places above enumerated because there was no available space in Chicago to store said equipment; that officials of defendant company made an extensive investigation in an attempt to find such a place, but were unable to do so.

We could add to that the first thing in the morning, if we think of anything else.

The COURT. If you have left out anything else. What do you say about this offer?

Mr. BEATTY. I will make an objection to it——

The COURT. That is what we are waiting to hear.

Mr. BEATTY. As to the form——

The COURT. As to the form?

Mr. BEATTY. Yes.

The COURT. What about the substance?

Mr. BEATTY. And as to the substance.

The COURT. You object to the whole offer?

Mr. BEATTY. Yes.

The COURT. On what ground?

Mr. BEATTY. Of course, all of the offer, as far as the substance is concerned, is an offer showing the expense of moving and relocating from the place in Clearing, the property condemned herein, to other places.

The COURT. That is the reason for your objection?

Mr. BEATTY. That is the reason. As to the form, it is not in form under the decisions of Illinois which govern the procedure in this case.

The COURT. All right.

Mr. BEATTY. For Mr. Boyden's benefit, the case of Barthelow v. Davis, 276 Ill. 505, 514, and 515, and Chicago City Railway Company v. Carroll, 206 Ill. 318, 328, should be in question, and the purported answer to the question. That is the effect of those decisions—I am just saving it for the Attorney General to chew on, your Honor.

55 The COURT. Your objection is sustained to the offer as made, and the record will show it. Now, does that conclude the evidence on both sides?

Mr. BOYDEN. Well, I think I would like to keep that open.

The COURT. Well, you may. Do you have any redirect?

Mr. BEATTY. Not that I know of.

The COURT. Will you have your instructions here in the morning?

Mr. BEATTY. Yes.

The COURT. Will you have yours?

Mr. BOYDEN. Yes.

The COURT. All right. I will see you about 10:15 in the morning.

Mr. BENJAMIN. I didn't hear your ruling. Did you sustain his objection to the offer?

The COURT. Yes.

Mr. BENJAMIN. Because of the substance and form; both?

The COURT. Yes, sir.

(Thereupon the further trial of the above-entitled case was adjourned until 10:15 o'clock a. m. of the following day, Friday, January 22, 1943.)

[Caption—48126.]

FRIDAY, JANUARY 22, 1943,
10:00 o'clock A. M.

Trial resumed pursuant to adjournment.

Present: Mr. Beatty, Mr. Boyden, Mr. Benjamin.

Mr. BEATTY. If your Honor please, I wish to withdraw the objection as to the form of the offer of proof and retain only that part as to the form.

The COURT. Your objection yesterday was as to the form and substance of the offer of proof, and now you are withdrawing that objection?

Mr. BEATTY. Not as to the substance, but as to the form.

The COURT. You did not state it that way. You said
56 that you made an objection yesterday as to the form of the offer of proof and that you were withdrawing that objection and retaining only the objection as to the "form". Let us see what your objection is, now.

Mr. Reporter, didn't Mr. Beatty say that he was only objecting as to the form?

(The record was read as above recorded.)

Mr. BEATTY. The objection as to the substance is the same, and the objection as to the form of the offer is withdrawn.

The COURT. Whatever that means, it is all right with me.

Mr. BEATTY. The substance is the thing that is really in dispute here.

The COURT. You are still objecting to the substance?

Mr. BEATTY. Yes, your Honor.

The COURT. That is what I thought you were objecting to yesterday, but you kept talking about form all the time.

Mr. BOYDEN. The record now shows an objection to the form, and objection sustained to the form, and an objection to the substance, and an objection sustained to the substance: In other words, your Honor sustained an objection both as to the substance and form.

The COURT. And you want "form" stricken out, and the objection made and sustained as to the substance?

Mr. BEATTY. That is right.

Mr. BOYDEN. Just so the record is perfectly clear, that there is no objection to form to this offer of proof, that is, of course, very satisfactory.

Mr. BEATTY. That objection is withdrawn.

The COURT. Very well.

Mr. BOYDEN. The record, therefore, will show the only objection which is sustained is as to the substance of the offer of proof.

The COURT. That is right.

Mr. BEATTY. Yes.

The COURT. Is there any further proof to be introduced this morning?

Mr. BOYDEN. I beg your pardon?

The COURT. Are you offering any further proof? You wanted the case held over until this morning.

Mr. BOYDEN. No. That was only because of the sustaining of the objection to the form of the offer of proof. I have no further evidence, your Honor.

The defendant rests.

Thereupon the Defendant Rested Its Case, in Chief.

57 Mr. BEATTY. Mr. Boyden, do you have the exhibit you offered?

Mr. BOYDEN. Yes.

The COURT. Is the Government going to have any further proof to offer?

Mr. BEATTY. Yes, I will.

The COURT. All right.

Mr. BEATTY. Do you still want to offer this in evidence, Mr. Boyden?

Mr. BOYDEN. It was offered and it was refused, though.

Mr. BEATTY. If your Honor please, as to Defendants' Exhibit 1 for identification, offered in evidence as Defendants' Exhibit 1, the objection on the part of the Government is withdrawn.

Mr. BOYDEN. I am not renewing the offer to put it in.

The COURT. What is it?

Mr. BEATTY. It is a report of the United States Division Engineer, by Mr. List, who appraised the property at their request, which was objected to when they offered it yesterday. I am not objecting to it now.

Mr. BOYDEN. I am not offering it now.

The COURT. Why not?

Mr. BOYDEN. I do not need it. He testified he made a finding, and he told the Signal Corps about it, and that is sufficient evidence for our purposes.

The COURT. Then there isn't anything in connection with that exhibit that you care to have put in?

Mr. BOYDEN. No. That is all in in his testimony.

The COURT. All right.

And thereupon, the plaintiff, after the close of the defendants' case in chief, introduced the following evidence, in rebuttal, to wit:

Mr. BEATTY. I will call Mr. Thorp.

The COURT. You call him?

Mr. BEATTY. Mr. Thorp.

58 CHARLES R. THORP, heretofore called as a witness in behalf of the Defendant, General Motors Corporation, in the above-entitled caused, now called as a witness in behalf of the plaintiff, was examined and testified as follows:

Direct examination by Mr. BEATTY:

Q. Mr. Thorp——

The WITNESS. Yes, sir.

The COURT. You were sworn yesterday, were you not, Mr. Thorp?

The WITNESS. Yes, sir.

The COURT. You do not have to be sworn again; just be seated.

Mr. BEATTY. Q. Mr. Thorp, you are the same Mr. Thorp who testified in this case yesterday, are you not?

A. Yes, sir.

Q. You had charge of the negotiations of this lease with the War Department of the United States Government; is that true?

A. Under my supervision, sir.

Q. And——

The COURT. Which lease are you talking about now, Mr. Beatty?

Mr. BEATTY. The lease between the Government and General Motors Corporation, which has been offered in evidence, which was offered in evidence yesterday, if your Honor please.

The COURT. Between the Government and the General Motors Corporation?

Mr. BEATTY. Yes; if your Honor please.

The COURT. As to a part of this building?

Mr. BEATTY. As to a part of this building; yes, sir.

The COURT. All right.

Mr. BOYDEN. The part not here in question.

Mr. BEATTY. That is right.

The COURT. All right.

Mr. BEATTY. Q. And isn't it true that the firm of Nicholson, Porter & List represented the General Motors in the negotiation of that lease?

A. Yes, sir.

Q. Did you pay them a percentage of the commission on the negotiation of that lease, Mr. Thorp?

59 Mr. BOYDEN. Objected to.

The COURT. Objection sustained.

Mr. BEATTY. Your Honor, I would like to argue the point, out of the presence of the jury, if I may.

The COURT. What difference does it make what arrangements they had between them, with the representatives of the Real Estate Department?

Mr. BEATTY. It makes quite a bit of difference.

The COURT. Come over here and let's see what it is all about.

(Thereupon ensued a discussion between Court and Counsel, out of the presence and hearing of the jury and the reporters, after which the following:)

The COURT. You want to get that in the record, do you?

Mr. BEATTY. If your Honor please, I would like to state my objection more fully.

The COURT. Your objection, or your motion, which? You are not making an objection. Mr. Boyden is making the objection.

Mr. BOYDEN. I am making the objection, and it has been sustained, you see.

The COURT. Yes.

Mr. BEATTY. I want to explain my position on the record.

The COURT. Oh, your position. You said your objection.

Mr. BEATTY. May I state that to the reporters, out of the presence of the jury?

The COURT. Yes.

(Thereupon, out of the hearing of the jury, the following proceedings were had, to wit:)

Mr. BEATTY. The witness, Erwin H. List, appeared as a witness for the General Motors. It is believed that the Government has a right to show the interest of the witness in a percentage of commission on the negotiation of the lease offered in evidence as Defendants' Exhibit 5, and to show that the negotiations between the General Motors and Erwin H. List in respect to compensation for the negotiation of said lease was void as against public policy.

Mr. BOYDEN. Objection to that offer.

The COURT. The objection is sustained.

Mr. BEATTY. Exception.

(And thereupon the further proceedings in the above entitled cause were resumed before the Court and jury, as follows, to wit):

60 Mr. BOYDEN. Your Honor, I noticed in the transcript, the reporters do not show my exceptions.

The COURT. It is my understanding that the exceptions are not necessary to be saved in the United States Court.

Mr. BEATTY. I think that matter was raised in a case some time ago, and I pointed out there was some question as to whether we would have to reserve exceptions in these cases, as being an exception from the ordinary rule that exceptions do not have to be saved.

The COURT. All right, if the record does not show your exceptions, the record may not show it, Mr. Beatty.

Mr. BOYDEN. It may show my exception to the ruling of the Court.

The COURT. Yes.

Mr. BEATTY. Q. Mr. Thorp, then it is true that Mr. List represented General Motors Corporation in the negotiation of a lease with respect to the 102,000 square feet of this building that was leased to the Government?

A. Yes, sir.

Q. Isn't that true?

A. Yes, sir.

Q. Mr. Thorp, when did General Motors vacate the 93,673 square feet of floor space?

A. I can only state that it was approximately some time between the 19th of June—the actual date I do not have in mind.

Q. Do you know the date that they turned over the keys to the representative of the War Department?

Mr. Boyden. I object to that, your Honor.

The record in this case, the petition shows the date they condemned this property, which is the legal date at which the condemnation started. The taking date is the legal date on which the condemnation started, you. Honor.

The Court. You are bound by the taking date, aren't you?

Mr. Beatty. That, your Honor, is the question you may have to decide before you submit this matter to the jury.

The Court. That is the date on which you actually start, don't you?

Mr. Beatty. That is the date of the valuation; yes, sir.

Mr. Boyden. The order provides for June 8th, your Honor.

61 Mr. Beatty. But the actual date of the delivery of this property was some time in July, as I recall there.

Mr. Boyden. Well, I object to counsel making those statements in the presence of the jury. There is no evidence in the record as to when that happened. You are bound by the taking date.

The Court. Well, the jury will ignore it as not evidence of any kind. What is the question to Mr. Thorp?

Mr. Beatty. Read it.

(The question was read, as follows:

"Q. Do you know the date that they turned over the keys to the representatives of the War Department?")

The Court. He may answer that question. If you know, Mr. Thorp?

The Witness. A. Well, I would have to check on my records over there. They actually closed operations for a shipment to our dealers and began the complete vacation of the building on the 19th of June, as I understand, and completed it some few weeks later.

Now, in the interim, before we had turned over the entire property to them, however, we permitted them to come in and take some 25,000 feet in the rear of the building that we had vacated prior to the turning over of the 93,000 square feet.

Mr. Boyden. I move to strike out the answer of the witness, if your Honor please.

The Court. Why?

Mr. Boyden. Well, I still think they are bound by the taking

date, and it is immaterial to any issue in this case.

The COURT. Motion denied.

Mr. BOYDEN. Exception.

(To which which ruling of the court, the defendant, General Motors Corporation, then and there duly excepted.)

Mr. BEATTY. Q. Mr. Thorp; will you give us the dates from your records upon which the 25,000 square feet of floor space was delivered to the United States Government?

A. I think Mr. Essex will be able to give you the records; he is the one that gave it to them; the report.

Q. Mr. Essex is here?

A. Mr. Essex is here.

Mr. BEATTY. That is all. Thank you.

The COURT. Mr. Boyden, do you want to ask any questions?

62 Mr. BOYDEN. No questions.

The COURT. That is all. All right.

(Witnes' excused.)

Mr. BEATTY. Call Mr. Essex, please.

CHARLES ESSEX, heretofore called as a witness in behalf of the Defendant, General Motors Corporation, in the above entitled cause, now called as a witness in behalf of the plaintiff in the above entitled cause, was examined and testified as follows:

Direct examination by MR. BEATTY:

The COURT. You have been sworn?

The WITNESS. Yes, sir.

The COURT. You don't have to be sworn again. Be seated.

Mr. BEATTY. Q. Mr. Essex, you are the same gentleman who appeared as a witness on yesterday, are you?

A. Yes, sir.

Q. I take it?

A. Yes, sir.

Q. Will you tell us what date the General Motors Corporation turned over approximately 25,000 square feet of the 93,673 square feet of floor space that is in question in this case to the Government?

A. If you will just give me time to refer to the record.

Mr. BEATTY. All right.

The WITNESS. I have the record here.

Mr. BEATTY. All right.

Mr. BOYDEN. I make the same objection, it is not material, your Honor.

The COURT. The same ruling.

Mr. BOYDEN. Exception.

(To which ruling of the Court, the defendant, General Motors Corporation, then and there duly excepted.)

(The witness examines documents.)

The WITNESS. On July 8th.

Mr. BEATTY. Q. That is the date the 25,000 square feet of floor space of the space involved in this proceeding was turned over to the War Department?

63 A. That is right, sir.

Q. Now, will you tell us when the remainder of the 93,673 square feet of floor space was turned over to the War Department?

Mr. BOYDEN. The same objection.

The COURT. The same ruling.

Mr. BOYDEN. Exception.

(To which ruling of the Court, the defendant, General Motors Corporation, then and there duly excepted.)

The WITNESS. A. On July 23rd.

Mr. BEATTY. Thank you very much, Mr. Essex.

The COURT. July 23rd, what year?

The WITNESS. 1942.

The COURT. 1942?

The WITNESS. Yes.

Mr. BEATTY. That is all.

The COURT. Any cross?

Cross-examination by Mr. BOYDEN:

Q. Do you know what date the War Department condemned this property?

A. June 8th, I believe, sir.

Q. 1942?

A. 1943.

Q. And shortly after did you or did you not have a conversation with a member of the Signal Corps with respect to this condemnation?

A. Approximately eight days later.

Q. That would be what date?

A. About June 16, 1942.

Q. About June 16, 1942?

A. Yes, sir.

Q. Who was that officer?

A. Captain Gilpatrick.

Q. Will you tell the jury what that conversation was.

Mr. BEATTY. If your Honor please, I object upon the ground that it is entirely immaterial. The record speaks here as to what took place.

Mr. BOYDEN. He opened up the question.

The COURT. You cannot have the record stand up in one situation and not stand up in another. Now, you opened it up and
64 I think your opponent has the right to go alongside of you and find out about the situation, too.

Mr. BOYDEN. We would like to find out just what happened, just what was done.

The COURT. The objection is overruled.

Mr. BEATTY. Exception.

(To which ruling of the Court, the plaintiff then and there duly excepted.)

Mr. BOYDEN. Q. Will you tell the jury the substance of your conversation with Captain Gilpatrick?

A. The substance of the conversation was, Capfain Gilpatrick asked how quickly we could get out, and my answer was too indefinite to suit Captain Gilpatrick, so he made the remark that I should understand that we—I forget the exact words that he used—at any rate that the condemnation was as of June 8th, and we were trespassing on his property, and he wanted us out of there inside of four days, and if we didn't get out he would bring in a load of soldiers and move us out in the street.

Q. And thereafter did you close down the business you were doing there?

A. I did.

Q. On what date?

A. On June 19th.

Q. What day was June 19th?

A. On a Friday.

Q. On a Friday?

A. Friday——

Q. And thereafter did you do any business relating to General Motors in that location?

A. None whatsoever.

Q. And your activity from June 19th until the date in July when you turned over finally this property was confined to what; what were you doing during that time?

A. Segregating the parts, of which there were 33,000 different parts stored there, shipping those parts——

Mr. BEATTY. If your Honor please, I object to the detailed answer of the witness.

The COURT. Yes; I shall sustain the objection to that. You have your evidence in. I think that is sufficient.

Mr. BOYDEN. Your Honor, the suggestion he is attempting to make to this jury is that we were not, did not vacate the property, and they did not have the use of it, and inferentially, we were using it for our own purpose.

65 The COURT. He has testified that you were not using it for your own purpose after that date, Mr. Boyden.

Mr. BOYDEN. He has testified that we were not using it, but don't you think I am entitled to show what we were doing, and that we got out just as quickly as we could?

The COURT. I think he has told the jury you got out as quickly as you could. I think you have covered that. He said that you had 33,000 parts which took some time to get them out of the building.

Mr. BOYDEN. Q. Did you hire extra men and make every effort you could to move as speedily as possible?

A. I did.

Mr. BOYDEN. That is all.

Redirect examination by Mr. BEATTY:

Q. Mr. Essex, until June 19th you continued your operations at this place and continued the occupation of the entire 93,673 square feet of flour space condemned in this proceeding?

A. Yes.

Q. Isn't that true?

A. That is correct.

Mr. BEATTY. That is all.

Mr. BOYDEN. Just a minute.

Re-cross-examination by Mr. BOYDEN:

Q. Mr. Essex, do you know of your own knowledge the date that we received this summons; the notice of this taking?

Mr. BEATTY. If your Honor please, I think the record will speak on that more clearly than Mr. Essex's recollection.

Mr. BOYDEN. The record will not show the date we received it.

The COURT. The record will show the date it was served.

Mr. BOYDEN. What?

The COURT. The record will show the date it was served, certainly.

Mr. BOYDEN. Yes.

The COURT. That must be a matter of record. Is there any dispute about that?

66 Mr. BOYDEN. Yes; the petition, which we did not receive until the 16th or the 17th.

The COURT. But when you received it, and when it was served may be two different days.

Mr. BOYDEN. The record shows we were served with the summons on June 15, 1942.

The COURT. Well, that is the record, if that is what it shows.

Mr. BOYDEN. That is all right, then; I will withdraw the question. Thank you, Mr. Essex.

Mr. BEATTY. That is all, Mr. Essex. Thank you.

(Witness excused.)

Mr. BEATTY. The Government rest.

And thereupon the Plaintiff rested his case in rebuttal.

The COURT. Do you rest?

Mr. BOYDEN. That is right.

And thereupon the Defendant, General Motors Corporation, rested its case.

The COURT. The jury may be excused for a few minutes while we discuss some other matters here.

(Thereupon, out of the presence and hearing of the jury, the following proceedings were had, to wit:)

The COURT. Have you exchanged instructions with each other, or not?

Mr. BOYDEN. No, your Honor.

The COURT. Why not?

Mr. BEATTY. I have had a rather unfortunate misanderstanding with my distinguished counsel opposing me here.

The COURT. It is unfortunate, you say?

Mr. BEATTY. Yes.

Mr. BOYDEN. Have you got a copy of our instructions?

Mr. BEATTY. If your Honor please, on behalf of the United States of America, I tender my offered instructions marked Roman numerals "I, II, III, IV, V, VI, and VII."

(Thereupon Government counsel handed up to the Court the following instructions, to wit:)

67 *Plaintiff's tendered instructions*

I

It now becoines the duty of the Court to instruct you, ladies and gentlemen of the jury, upon the law which governs the issue in this case. It is your duty to accept the instructions of the Court as to the law and to be governed by them in your deliberations in the jury room. The Court instructs the jury that the Government has the right to condemn or take private property for a temporary use under its power of eminent domain. That power is subject only to the payment of just compensation which the Constitution requires. The law requires the just compensation to be an amount of money which shall be just to the owner of the property taken and also just to the Government.

II

As has been shown by the evidence the Government has condemned and taken the right to use and occupy the property for the period from July 8, 1942, to June 30, 1943.

III

The just compensation for the use of said premises is the fair rental value of the premises, including of necessity heat and water, for the term just mentioned as though the defendants, Clearing Industrial District and General Motors Corporation, had leased and the Government or any other tenant had rented the premises, and upon the assumption that the defendants were willing to lease and the Government was willing to rent the premises at the fair or market rental value of an annual rent.

Johnson v. United States, 2 C. Cls. 391.
Gershon Bros. Co. v. United States, 284 Fed. 849.
Railway Steel Spring Co. v. C. & E. I. Railway Co., 261 Fed. 690, 694.

IV

Fair or market rental value means that sum of money for which the property could be rented, if offered for rent, in the open market by a reasonably prudent owner, who is ready, willing,
68 and able to lease, to a reasonable prudent person, who is ready, willing, and able to lease and to pay rent in cash or monthly payments, neither of whom are under any compulsion to lease the property.

V

A reasonably prudent person is one who has had an opportunity to become acquainted with the property, its use or uses, and after due consideration of all elements of value or which affect value for rental purposes, can exercise a sound judgment in leasing or renting the property.

VI

The leases admitted in evidence should be considered by the jury in so far as such leases, looking at the circumstances of each lease, may evidence or supply light upon the fair or market rental value of the land condemned herein, but unaffected by the Government's declared intention to acquire the lease of the property for public purposes.

VII

The jury are instructed that they are the judges of the credibility of the witnesses and the weight which shall be given to the testimony of each witness, that such judgment of credibility of the witnesses and the weight to be given their testimony should be tested in the light of accepted human experience, considering the demeanor of the witness, and the nature and extent of his knowl-

edge and understanding of the facts involving the question at issue in this case.

Colloquy.

Mr. BOYDEN. We have an objection to this form of verdict.

The COURT. Let's get down to the instructions, first. Have you seen his instructions?

Mr. BENJAMIN. We have them here right now, reading them.

The COURT. I thought that was what you were doing. You better look at his. You can look at each other's. I thought that is what you were doing there.

Mr. BOYDEN. We tender on behalf of the defendant, General Motors Corporation, instructions 1 to 10, marked
69 with a Roman numeral at the time and with a plain number at the bottom of the instruction.

The COURT. All right. Well, have you read the Government's instructions?

Mr. BOYDEN. Yes, your Honor.

The COURT. Let's go over them now and see what differences you have. What about number 1; instruction number 1?

Mr. BOYDEN. We have no objection to that instruction, your Honor.

The COURT. No. 2?

Mr. BOYDEN. 2; Instruction number 2 of the Government, Defendant objects to. The period is incorrectly stated as July. It should be June 8th.

The COURT. How do you get July 8th?

Mr. BEATTY. If your Honor please, these people did not actually move and turn over any space to the Government until July 8th, according to Mr. Essex's testimony.

Mr. BOYDEN. The testimony was he shut down the plant and went to work moving things out so the Government could get in, and stopped his operations on June 19th.

The COURT. No; he stopped his operations on June 19th; that he received service of summons on June 16th, and on the same or the next day had a talk with Captain Gilpatrick.

Mr. BOYDEN. He said that on the same or the next day he had a talk with Captain Gilpatrick who told him to get out as soon as he could thereafter, and that he did that.

The COURT. June what?

Mr. BOYDEN. June 19th; Friday.

The COURT. Then, that is the proper date, instead of July 8th.

Mr. BOYDEN. June 8th is the date of taking, and that legally is the date they are bound by.

Mr. BEATTY. The date of immediate possession was June 8th, but July 23rd was the date they took possession.

The COURT. I think they should pay for the time after they stopped operations.

Mr. BOYDEN. June 19th.

The COURT. June 19th.

Mr. BOYDEN. Friday, June 19th.

The COURT. Yes.

Mr. BOYDEN. We object to the instruction in its new form, on the ground the correct date is the date of taking, and the order giving them the right to immediate possession is June 8th.

70 The COURT. You object to what?

Mr. BOYDEN. The instruction reading June 19th. We say legally they are bound by the order of June 8th, giving them immediate possession; that that is the correct date.

The COURT. Well, you can't both be in possession and running your business, and the Government being in there at the same time. Your witness said under oath that the functioning of the General Motors branch ceased on June 19th.

Mr. BOYDEN. That is correct, your Honor.

The COURT. That is the date we will leave in there. Now, number 3, what about that?

Mr. BOYDEN. Defendant objects to Government's Instruction number 3, as offered, on the ground that is does not state correctly, define correctly, the compensation to which defendant is entitled.

The COURT. In what respect?

Mr. BOYDEN. It does not include any element of cost of moving, any element of damaged property, any expense in connection with the condemnation, and contains an assumption that defendants were willing to lease to the Government, was willing to rent at a fair rental value, or market value, and the words "market value" and "rental value" have no relevancy in a proceeding of this kind. That is the objection, your Honor.

The COURT. It is the market value of the rental value, isn't it?

Mr. BOYDEN. I don't know what that means in a case of this kind, and that is my objection, your Honor.

The COURT. That is the difficulty we encounter in all these cases, isn't it?

Mr. BOYDEN. That is correct.

The COURT. Just what those words mean.

Mr. BOYDEN. This case I read your Honor, the order pointed out the "fair market value of a lease" means nothing in cases of this kind.

The COURT. They encounter the same situation in all these cases. They encountered the same situation in this Miller case, where the Court said the owner is entitled to the fair market value. The

term "fair" hardly adds anything to it. So, apparently everybody is confused as to what these words mean. It is not at
71 all strange, therefore, that we, out in this city, can be a little confused, in view of what the Supreme Court said last week. Well. And what about number 4? That gets down to the same proposition.

Mr. BOYDEN. Yes; Government's instruction number 4 is objected to for the same reason. If furnishes no basis by which the defendant's damages can be considered.

The COURT. Because it leaves out the elements that I refused to let go to the jury?

Mr. BOYDEN. That is right.

The COURT. How about number 5.

Mr. BOYDEN. Number 5 is objected to as having no relevancy to this case at alk

The COURT. What about number 6?

Mr. BOYDEN. Number 6 is objected to for the reasons above stated, and because it contains the phrase "market rental value of the lease condemned," instead of the "land condemned" and has no relevancy in this case, and is not, in this case, the measure of damages.

The COURT. What do you say about that?

Mr. BEATTY. Well, the land includes the building, your Honor.

The COURT. Could you use the word "lease" there instead of land?

Mr. BOYDEN. It is a leasehold interest they condemned. It would be more accurate to say that. It would not cure my objection, but it would simply be more accurate.

The COURT. The rental value of the leasehold interest condemned here would more accurately describe what was condemned. You see where we are referring to?

Mr. BEATTY. Yes. Rental value of the land condemned herein. We condemned the land for a term of years, your Honor.

The COURT. You are really condemning a leasehold.

Mr. BEATTY. We are really condemning a leasehold there.

The COURT. Wouldn't it more accurately describe it. You say the leasehold interest in the land condemned herein. That refers back to the leasehold interest this company has in it.

Mr. BEATTY. I will consent to a change to "leasehold interest in the land."

The COURT. What about the last instruction? That is just a stock instruction.

72 Mr. BOYDEN. We think that is fine, Judge.

Mr. BEATTY. You think that is fine?

Mr. BOYDEN. Yes.

The COURT. What about Mr. Boyden's instructions here?

Mr. BEATTY. If your Honor please, the instruction number 1 talked about some more general language that the Court's have used. I object to that, because it does not limit the sum or sums of money as will make them whole, and the leasehold interest in the real property taken in this proceeding.

Defendant's tendered instructions

The COURT (Reading). "The Court instructs the jury that just compensation, as that term is used in this case, is the payment to the respondents of such a sum or sums of money as will make them whole, so that upon receipt of the same, they will be neither richer nor poorer by reason of the taking of the leasehold interest in question than they would have been if the same had not been taken."

Mr. BEATTY. The Courts have said that an owner of property, taken for public use, is entitled to be made whole and put in as good a pecuniary position as if his property had not been taken. Again it creates the same situation that Justice Roberts has so ably discussed in United States vs. Miller, in that it does not make a qualification or a limitation as to the making them whole. Making them whole is to give them a fair rental value of the property taken for the time used by the Government.

The COURT. Well, it also means, I imagine, that it makes them neither richer nor poorer as the result of this transaction between the Government and the defendant.

Mr. BEATTY. That is true. But, to make them whole, in view of the position of the authority, would be to pay them all of these incidental expenses, in the thinking of counsel for the General Motors, defendant herein.

The COURT. No; that evidence is not before the jury.

Mr. BEATTY. Of course, that is true, but the making of them whole is limited to the interest taken by the Government in the property involved here for the time that the Government seeks to occupy it.

The COURT. Well, they say here it will make them whole, by the reason of the taking of the leasehold interest taken. They are entitled to have an instruction like that. We can leave out the "richer or poorer." Let's look at number 2.

73 (Instruction number 2, tendered by the defendant, General Motors Corporation, is as follows:

"The Constitution of the United States of America provides that no 'private property (shall) be taken for public use, without just compensation.' The purpose of this proceeding is to ascertain what is the just compensation to be paid by the United States of

America for the taking of the property of the respondent, General Motors Corporation, for public use.")

Mr. BEATTY. If your Honor please, that is essentially the first instruction that I offered.

The COURT. What do you say about that, Mr. Boyden; isn't that practically the same, your number 2, as Government's number 1?

Mr. BOYDEN. I think so, your Honor.

The COURT. Number 3.

(Instruction Number 3, tendered by the defendant, General Motors Corporation, is as follows:

"The Court instructs the jury that it is the function of the Court to determine the competency or incompetency of testimony which is offered; it is the function of the jury to determine the credibility and weight of such testimony.")

Mr. BEATTY. If your Honor please, that instruction number 3 is essentially the same as number 7 of the Government.

The COURT. That is the last instruction; about the credibility of witnesses.

Mr. BEATTY. Yes, your Honor.

The COURT. Is that about fair?

Mr. BOYDEN. Yes; that is covered.

Mr. BEATTY. I have no objection to number 4.

(Instruction number 4, tendered by the Defendant, General Motors Corporation, is as follows:

"The Court instructs the jury that you must not allow yourselves to be influenced in your consideration or decision of any of the issues in this case by the fact that petitioner is the United States Government proposing to acquire the property in question for public purposes, nor by the fact that the amount of your award will be paid out of money raised directly or indirectly by public taxation, nor by the fact that respondent is a corporation. You should decide this case solely upon the evidence under the instructions of the court as to the law.")

74 The COURT. Why is not number 5 a repetition of number 1?

Mr. BOYDEN. We think the words used by the courts are a possible distinction.

Mr. BEATTY. I object to the instruction for the reason that it is a repetition.

The COURT. I think it is a repetition of number 1.

(Instruction number 5 tendered by the Defendant, General Motors Corporation, is as follows:

"The court instructs the jury that in all cases where private property has been taken for public use, as has been done in the present instance, the compensation to which the lessee whose in-

terest has been taken is entitled is the amount of money necessary to put the lessee in the same condition and position as it would have been had its property not been taken.")

The COURT. You can have either 1 or 5, whichever you think is the better one from your standpoint, Mr. Boyden; I think one is a repetition of the other.

Mr. BOYDEN. We prefer number 1 in preference to number 2.

The COURT. Number 6.

(Instruction number 6, tendered by the defendant, General Motors Corporation, is as follows:

"The jury are instructed that the respondent, General Motors Corporation, is entitled to just compensation, which is that sum of money which would reimburse it for the expenses reasonably and necessarily incurred as a result of the taking of its interest in the condemned property; and you are further instructed that, in arriving at that sum, you are entitled to consider the value of the leasehold interest, and the reasonable and necessary expenses incurred in the forced demolition of its property and in moving.").

Mr. BEATTY. We object to that.

The COURT. That covers the expenses. That is out. What about number 7?

(Instruction number 7, tendered by the Defendant, General Motors Corporation, is as follows:

"The Court instructs the jury that in determining the costs of moving respondent's business and the direct damage to respondent's property, both of which are part of the just com-
75 pensation to which General Motors Corporation entitled under the Constitution, you may take into consideration salaries, wages, freight, and other expenses which were reasonably incurred by respondent and which were the direct result of the condemnation you are here considering.")

Mr. BEATTY. Objection to that upon the same grounds, your Honor.

The COURT. The same thing. Number 8.

(Instruction number 8, tendered by the Defendant, General Motors Corporation, is as follows:

"The Court instructs the jury that you may take into consideration in determining the value of the leasehold taken the amount voluntarily paid by the United States Government under the lease it entered into on December 12, 1941, with reference to the 102,167 square feet of floor space."

The COURT. That says the jury can take into consideration the other lease.

Mr. BEATTY. Take it into consideration in view of all the evidence, your Honor. I do not think it need to be pointed out. It is a lease admitted in evidence, the same as the lease of 1928. There

is an objection to that, because it specifically points out an item of evidence for the jury.

The COURT. Well, I personally think that should be brought to their attention. There is a lease that the Government has made with the same parties here, evidently amicably arrived at, and for some reason or another the Government wants to make a lease for some additional space in the same building, apparently the same kind of a space at a reduced figure.

Mr. BEATTY. There are a good many things that can be argued about that lease, and, as I indicated it, I want to reserve all of the exceptions to that element as a factor in determining what is the fair rental for this propery that would be arrived at as of June 1942, between private persons, and not between private persons and the Government, which has power to take the property.

The COURT. Well, I know. After all, but here is the Government, they go out here to the southwestern part of our city, and there is a building, say approximately containing 200,000 square feet of space, and the Government sits down with a repre-
76 sentative of the lessee, and they arrive at a figure of what a little more than half of what that space is worth, and then the Government wants the rest of the building, the same building, the same kind of space, according to the testimony, and the Government says, "No, we won't give you that much, we want to reduce it."

Mr. BEATTY. There was a Congressional investigation of the operations of one agency of the Government in buying and leasing property, your Honor. And this one shows evidence of not being so much different than that.

The COURT. Well, after all, here is the General Mofors Corporation, and I don't think anybody would accuse them of collusion.

Mr. BEATTY. I am not accusing them of collusion.

The COURT. They made a lease years ago for a certain space and the price the Government is paying for that space is not above what they are paying under the lease.

Mr. BOYDEN. No. And as far as casting any aspersions——

Mr. BEATTY. I am not casting any aspersions on anybody connected with the General Motors Corporation.

The COURT. Let's talk about instruction number 8, then. That is where you make that objection that you last pointed out?

Mr. BEATTY. Yes, your Honor.

The COURT. We can add in there "When taken into consideration in connection with all the evidence in the case," not really pointing that out in particular.

Mr. BEATTY. That is as to 9 or 8?

The COURT. As to 8.

Mr. BEATTY. If your Honor please, I will raise the question that the mention of the particular lease, where there are several leases mentioned in the evidence, is pointing out to the jury a particular lease, a particular bit of evidence, and for that reason I believe that the instruction, if given, is objectionable.

The COURT. All right. How about number 9?

(Instruction number 9, tendered by the Defendant, General Motors Corporation, is as follows:

"Neither by these instructions, nor by any words uttered, nor remarks made by the court during this trial does or did the court intimate or mean to express an opinion as to the weight or
77 credit to be given to any of the various witnesses who have testified, or as to what the facts are or what the facts are not in this case. It is solely and exclusively for the jury to determine the weight and credit to be given the testimony of the various witnesses who have testified, and to find and determine the facts, applying to their deliberations and to the facts as found by them the law as stated in these instructions.")

Mr. BEATTY. If your Honor please, instruction number 9 is objected to because it is essentially the same as instruction number 7 as offered by the Government.

Mr. BOYDEN. That is all right, your Honor. We do not insist on that.

The COURT. Have you got an instruction like that?

Mr. BEATTY. I object to that, because that injects into the evidence and to the instruction an element that is not an element of just compensation, which is the cause of carrying on this dispute with the Government, as to what is a fair rental value of the property that is taken.

The COURT. That is number 9?

Mr. BEATTY. Yes.

The COURT. I think we have ruled that out in the evidence. There is no use putting it in the instructions, as we go along.

Mr. BENJAMIN. May I ask Mr. Beatty one question which may call for an objection on instruction number 2?

The COURT. Yes.

Mr. BENJAMIN. Isn't it true, Mr. Beatty, the law is to the effect, in figuring damages in compensation cases or arriving at a market value, you arrive at it as of the date of the taking of the property, the entry of the order of taking?

Mr. BEATTY. That is true, with a certain modification. The question is what is the date of taking? Is it the date the Court entered the order that we are entitled to immediate possession, or is it the date we get the possession?

Mr. BENJAMIN. Well, I am asking you, as a matter of law; isn't that the standard?

Mr. BEATTY. As a matter of law, I don't think the point is clear. It is a matter of fact and law which the Court has to pass upon at the time a question of this kind is presented.

The COURT. I don't think the mere fact the Government
78 filed a declaration of taking down here obligates it from that time on. I think the actual taking should be figured.

Mr. BENJAMIN. I grant you, on a declaration of taking, that is true. But the Government did not pursue that policy here. They had an order of immediate possession entered on June 8th, and as of that date, and from that time on, we had no rights in the property as far as the leasehold interest was concerned. Is that right?

The COURT. Well, they say in that declaration, they had a right to take immediate possession.

Mr. BENJAMIN. I think Mr. Beatty will agree with me.

Mr. BEATTY. I drew and presented it to your Honor.

Mr. BENJAMIN. And didn't you inform me, when I raised the question as to what date the papers would date from, you said June 8th?

Mr. BEATTY. I considered that date generally speaking as the date of taking. But here is the date of actual possession.

The COURT. This order merely provides they have a right to take immediate possession. Now, when they did actually take possession is another matter.

Mr. BEATTY. That is true, your Honor.

(Instruction number 10, tendered by the defendant, General Motors Corporation, is as follows:

"The Jury are instructed that, in arriving at the just compensation to be awarded to the defendant herein, you are to consider what it has lost as a result of this action on the part of the Government and you are not to base your considerations and deliberations upon what the Government has gained thereby.")

Mr. BOYDEN. May I see the form of verdict? Our objection to this verdict was the objection we made before that the words "just compensation" should include the expenses of moving and damages to the property, set out before in that regard. Except for that objection, we have no objection to the form of verdict.

Mr. BEATTY. If your Honor please, as to this form of verdict—— verdict——

The COURT. Well, that is saved by your objection.

Mr. BOYDEN. Yes.

Mr. BEATTY. That is right.

Mr. BOYDEN. That is right.

Mr. BEATTY. If your Honor has indicated June 19, 1942,
79 as the date of the beginning of the term, may I suggest that instead of "from a year ending June 30, 1943" that the verdict be for the term "from June 19, 1942, to June 30, 1943"?

The COURT. "For the term"?

Mr. BEATTY. From "June 19, 1942, to June 30, 1943." Do you want to put in "inclusive" after 1943?

Mr. BENJAMIN. No. One day more won't make much difference.

The COURT. From "June 19, 1942, to June 30, 1943."

Mr. BEATTY. Yes.

The COURT. Is that right?

Mr. BEATTY. Yes, your Honor.

The COURT. We will strike out that "term of years," then.

Mr. BEATTY. Yes, cut out the words "of years ending."

The COURT. Strike out "of years ending" and insert "the term, for the term from June 19, 1942, to June 30, 1943."

Mrs. BEATTY. Yes.

The COURT. So that you gentlemen will understand what instructions I am going to give to the jury, I am going to give the instructions 1 to 7, handed up by the Government, and I am going to give instructions, 1, 4, and 8 submitted by the defendant.

Under these rules, after the instructions have been read, and before the jury retires, counsel must be given an opportunity to state what exceptions he has to these instructions given.

The way that works out usually, is that the objections which you have just made, as you have been going over these instructions, may be considered the exceptions you will make at the conclusion of the reading of the instructions.

Mr. BOYDEN. That will be very satisfactory.

Mr. BEATTY. That is satisfactory, if your Honor please.

Mr. BOYDEN. And may we also note an exception to the refusal to give out instructions?

The COURT. Yes, sir; you are saying an exception to my denying you the right to have the instructions given that I have indicated I have refused.

Mr. BOYDEN. That is correct.

The COURT. All right. Bring in the jury.

(Thereupon, in the presence and hearing of the jury, the following proceedings were had, to wit:)

80 *Court's instructions to jury*

(Thereupon the Court instructed the jury, as follows:)

The COURT. At this time, ladies and gentlemen of the jury, it becomes the duty of the Court to give you the instructions upon

the law which will govern your deliberations in connection with arriving at a verdict in this case.

The first thing I want to tell you is this: That when you go into that jury room you do not have to leave outside your common sense, those experiences which have been yours throughout your lives and those things which cause you to pass upon the important affairs of your individual lives, those things which make up for each one of you the common sense which you possess. You take that into the jury room with you, you don't have to leave that outside, and that can stay with you while you are deliberating until your have finally reached a verdict in this case.

You do not have to leave the role of your ordinary being when you go in there as a juror.

Now, it is the duty of the Court to instruct you upon the law which governs the issues in this case and it is your duty to accept these instructions as to the law and to be governed by them in your deliberations in the jury room. The Court instructs the jury, as a matter of law, that the Government has the right to condemn or take private property for a temporary use under its power of eminent domain. That is the right given to the Government by the Constitution. The power is subject only to the payment of just compensation which the Constitution requires. The law requires the just compensation to be an amount of money which shall be just to the owner of the property taken and also just to the Government.

As has been shown by the evidence in this case, the Government has condemned and taken the right to use and occupy the property in question for the period from June 19, 1942, to June 30, 1943.

The just compensation for the use of premises is the fair rental value of the premises, including of necessity heat and water, for the term just mentioned as though the defendants, Clearing Industrial District, the General Motors Corporation, had leased and the Government or any other tenant had rented the premises and upon the assumption that the defendants were willing to lease and the Government was willing to rent the premises at the fair or market rental value of an anual rent:

You are also instructed that just compensation, as that
81 term is used in this case, is the payment to the respondents, that is, the General Motors, of such a sum or sums of money as will make them whole, so that upon receipt of the same, they will be neither richer nor poorer by reason of the taking of the leasehold interest in question than they would have been if the same had not been taken.

Fair or market rental value means that sum of money for which the property could be rented, if offered for rent, in the open mar-

ket by a reasonably prudent owner, who is ready, willing and able to lease, to a reasonably prudent person who is ready, willing and able to lease and to pay rent in cash or monthly payments, neither of whom are under any compulsion to lease the property.

A reasonably prudent person, as herein defined, is one who has had an opportunity to become acquainted with the property, its use or uses, and after due consideration of all elements of value or which affect value for rental purposes, can exercise a sound judgment in leasing or renting the property.

The leases admitted in evidence should be considered by the jury in so far as such leases, looking at the circumstances of each lease, may evidence or supply light upon the fair or market rental value of the leasehold interests in the land condemned herein, but unaffected by the Government's declared intention to acquire the lease of the property for public purposes.

In connection with all the other evidence presented in this case, you are instructed that you may take into consideration in determining the value of the leasehold interest taken the amount voluntarily paid by the United States Government under the lease it entered into on December 12, 1941, with reference to the 102,167 square feet of floor space.

You are also instructed that you, as jurors, are the sole judges of the credibility of the witnesses and the weight which shall be given to the testimony of each witness, that such judgment of credibility of witnesses and the weight to be given their testimony shall be tested in the light of accepted human experience, considering the demeanor of the witness or witnesses, and the nature and extent of his knowledge and under standing of the facts involving the questions at issue in this case.

You are also instructed you must not allow yourselves to
82 be influenced in your consideration or decision of any of the issues in this case by the fact that the petitioner is the United States Government proposing to acquire the property in question for public purposes, nor by the fact that the amount of your award will be paid out of money raised directly or indirectly by public taxation, nor by the fact that respondent is a corporation. You should decide this case solely upon the evidence and under the instructions as they have been given to you concerning the law governing you in this case.

Now, there is a form of verdict which will be submitted to you, and the first thing you should do upon arriving in your jury room is to select some one of your members as your foreman. Thereafter you will deliberate on your verdict, and if and when you have reached the verdict, this is the form which has been submitted to you:

"We, the jury, impaneled and sworn in the above entitled cause, do find and report that the just compensation, which the petitioner shall make for the taking of the property described in the petition for condemnation for the term from June 19, 1942, to June 30, 1943, is the sum of $_____."

In that space you will fill in whatever sum you award the petitioner in this case, or the General Motors, in this case, referred to as the petitioner.

That form of verdict should be signed by the person selected by yourselves as your foreman and by each of the other eleven jurors.

You will take with you to the jury room this form of verdict, together with the exhibits which have been admitted in evidence.

I take it the record may show, before the jury retires, and after the instructions were read, you then made the objections and you took the exceptions which you had made and which were taken while we were discussing the instructions before the jury came in.

Mr. BEATTY. That is right, your Honor.

Mr. BOYDEN. That is right, your Honor.

(There upon, after the Marshals were duly sworn to take charge of the jury, the jury retired to deliberate on its verdict.)

83 *Government Exhibit One*

UNITED STATES OF AMERICA,
DEPARTMENT OF JUSTICE,
June 1, 1942.

Pursuant to Title 28, Section 661, U. S. Code * * * 882, Revised Statutes), I hereby certify that the * * * paper is a true copy of the original record * * * Department, of a letter from the Honorable Henry L. Stimson, * * * of War, to the Attorney General, dated May 29, 1942, requesting the * * * by condemnation of a term for years ending June 30, 1943, of 93673 * * * of floor space, of more or less, in Cook County, Illinois, for use in * * * with the establishment of a signal corps depot in the General Motors * * * Chicago, Illinois.

In witness whereof, I have hereunto set my hand, and caused the seal of the Department of Justice to be affixed, on the day and year first above written.

[SEAL]

NORMAN M. LITTLE,
Assistant Attorney General.

NOTE.—Asterisks indicate illegible portions of photostatic copy of exhibit.

(Stamp) May 29, 1942.

The Honorable, The Attorney General, *Washington, D. C.*

DEAR MR. ATTORNEY GENERAL: It is necessary and advantageous to the interest of the United States that certain interests in lands located in Cook County, State of Illinois, be acquired by the United States of America for use in connection with the establishment of a signal corps depot in the General Motors Building, Chicago, Illinois.

Therefore, pursuant to the provisions contained in the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518; 50 U. S. C. sec. 171), and March
84 27, 1942 (Public Law 507—77th Congress), which Acts authorize the acquisition of land for military or other war purposes, and the Act of Congress approved April 28, 1942 (Public Law 528—77th Congress), which Act appropriated funds for such purposes, it is requested that you cause the necessary proceedings to be instituted for the condemnation of a term for years ending June 30, 1943. The interests in land to be acquired comprise 93,673 square feet of floor space, more or less, situate in Cook County, Illinois, and are more particularly described in the inclosed Exhibit "A" and on the inclosed map entitled Exhibit "D." The names of the purported owners of said interests in land are set forth in the inclosed Exhibit "A."

The Act of Congress approved April 28, 1942, supra, appropriated funds for this acquisition.

The aforementioned interests in land are to be utilized to provide for additional storage space and the utmost haste in expediting this project is vital to the successful prosecution of the war. It is requested that pursuant to the provisions of the Act of Congress approved March 27, 1942 (Public Law 507—77th Congress), you procure an order granting immediate possession of the aforesaid lands.

Appraisals are being obtained under the supervision of Lt. Col. F. I. Kennedy, Division Real Estate Director, Great Lakes Division, McCormick Building, 332 South Michigan Avenue, Chicago, Illinois, and the probable date of availability of the appraisal reports can be obtained by your field representative from the Division Real Estate Director. No arrangements have been made by this Department for the procurement of title evidence.

Inclosed herewith are two additional copies of Exhibit "A" and five additional copies of Exhibit "B."

Sincerely yours,

HENRY L. STIMSON,
Secretary of War.

2 Inclosures:
1—Exhibit "A" (in trip.)
2—Exhibit "B" (in sext.)

85 *Exhibit "A"*

Description.—Premises known and described as 5001 West 65th Street and 6510–40 South Lavergne Avenue, comprising approximately 93,673 square feet of floor space, being the Westerly portion of the one story building located at the Southwest corner of 65th Street and Lavergne Avenue, Chicago, Illinois, and being that portion of said one story building not presently under lease to the United States.

Names of Purported Owners.—Clearing Industrial District, Inc., General Motors Corporation, Argonaut Realty Division.

89 *Defendant's Exhibit 1*

MARCH 13, 1942.

UNITED STATES DIVISION ENGINEER,
Great Lakes Division,
Federal Reserve Bank Building, Cleveland, Ohio.

DEAR SIR: Returning the attached endorsement left with the writer yesterday by Lieut. J. Witkowsky, Jr., concerning the property leased by the Signal Corps, U. S. A., at 6510–40 So. Lavergne Avenue, Chicago, from General Motors Corporation, lease effective January 1, 1942.

The area leased is 102,167 square feet, or approximately one-half of the entire building at the above address, located in the Clearing Industrial District, which building is under lease to the General Motors Corporation by the Clearing Industrial District, said lease having originally been made in 1928 and expiring sometime in the year 1944.

In submitting a valuation of this property and substantiating the present rental to the Signal Corps, the writer wishes to state that he is particularly familiar with properties and conditions in the Clearing Industrial District, and has personally negotiated long-term leases or sales on 14 plants in this particular area in the course of the last 15 years.

In his opinion, the entire property would have a fair value in this market as follows:

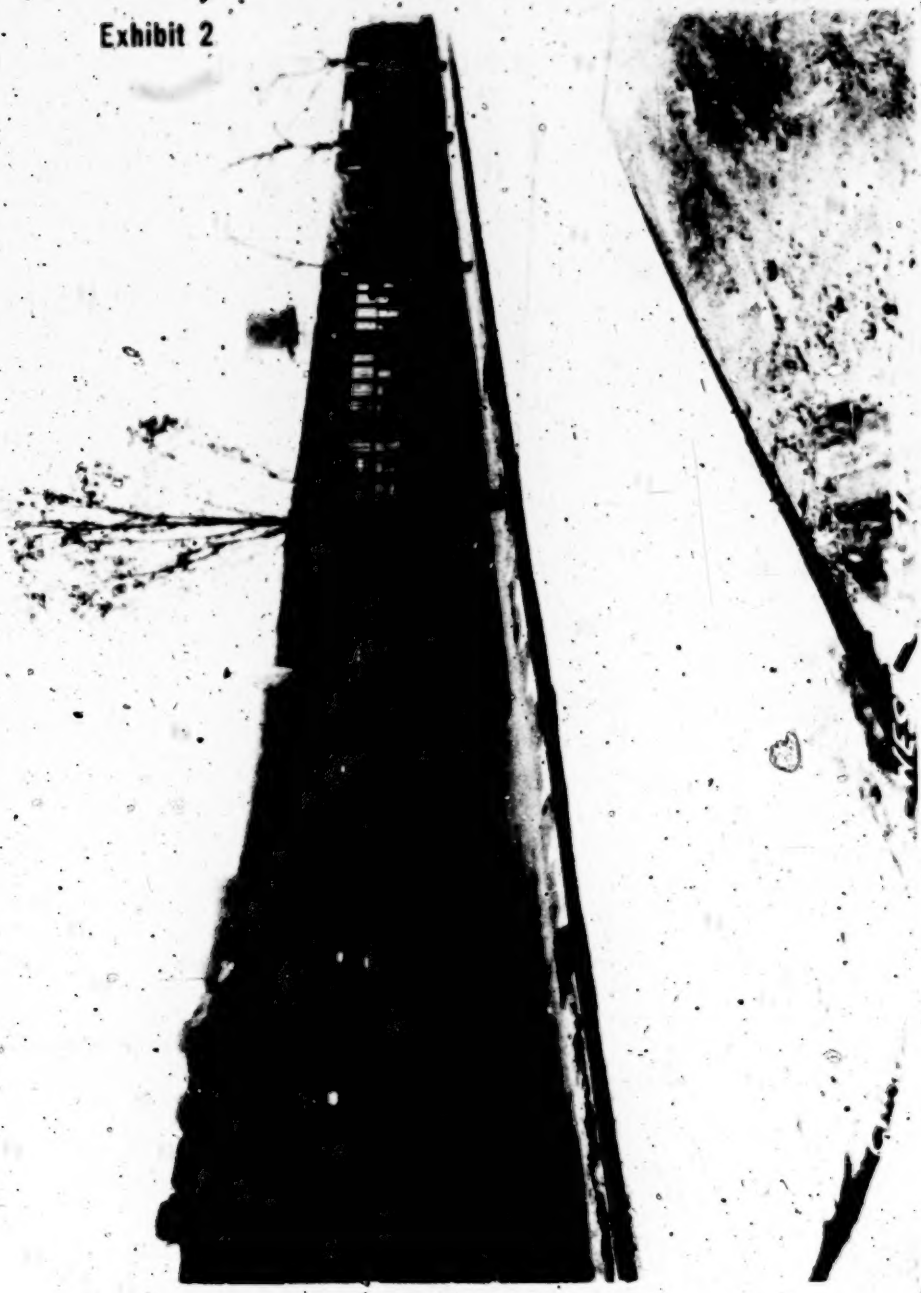
LAND

312 square feet @ 60¢ per square foot $187,277.40

IMPROVEMENTS

Modern, 1-story, brick and mill constructed building, truss roof, overhead skylight, concrete floor, sprinklered, equipped, low-pressure heating plant, adequate offices, truck loading docks, and an ex-

Exhibit 2



tensive system of switch tracks and concrete platforms to accommodate 50 cars at one setting,—tracks connected with The Belt Railway of Chicago. Floor area: 200,000 square feet @ $1.70 per square foot	340,000.00
Total valuation	527,277.40

90 Based on rental percentage of 15% of value equals $79,091, or 39½¢ per square foot, G. M. to pay taxes, insurance and general outside maintenance. With an allowance of 4¢ per square foot for heating the premises, this would be equivalent to a rental of 43½¢ per square foot, heated and maintained, which figure, for the 102,167 square feet in question, would represent a justifiable rental of $44,442.64 per annum.

In order to substantiate the above valuation, the writer has checked the original lease on this property and finds that under the purchase option contained in said lease, the improvements were given a value of $498,994, and on the basis of a depreciation allowance of 2½% per annum for 13 years, this would indicate a present-day value of $336,820.95, plus the above-mentioned land value ($187,277) or a total value today of $524,097.

In the writer's opinion, the rental in effect on this property is a fair rental and thoroly justified by present market conditions and values.

This firm represented the General Motors Corporation in the negotiation of the lease with the Signal Corps.

* * * * *

QUALIFICATIONS

I, E. H. List, hereby certify that I am Vice President and Treasurer of Nicolson, Porter & List, Inc., and Secretary and Treasurer of the Chicago Industrial Appraisal Co., with offices in the Continental Illinois Bank Building, Chicago, specializing in Industrial and Business Real Estate and in the appraisal of factory, warehouse and general industrial and commercial properties; that I am 50 years of age; that I am a member of The Chicago Real Estate Board and a Past Vice President and Chairman of its Industrial Division and for the years 1934–1935 and 1937–1938 an elected member of its Industrial Appraisal Committee and re-elected for the years 1942 and 1943; that I have frequently made studies and valuations of industrial and commercial properties in Chicago and surrounding territory.

I have been actively engaged in the appraising, buying, selling and leasing of improved and vacant properties in the Chicago area for the past 20 years.

I have personally examined the above-described property and have a record of sales of other similar properties.

I have no personal interest in the property hereinbefore described, and in my opinion the fair cash market value of the property as of March 13, 1942, is as set forth herein.

Respectfully submitted,

NICHOLSON, PORTER & LIST, INC.,
E. H. LIST,
Vice Pres. & Treas.

EHL/d.

Defendant's Exhibit 3

SUMMARY OF LEASE ON BUILDING KNOWN AS 5025 W. 65TH ST., AT LAVERNE, CLEARING, ILL.

Lessor—Clearing Industrial District, Inc.

Lessee—General Motors Corporation.

Term—June 1, 1928 to May 31, 1948.

Area—195,840 sq. ft. (building area not including outside docks).

Annual Rental—$54,553.30, which together with operation and maintenance costs, which are General Motors' responsibilities, figure slightly over 42¢ per square foot per year over the years 1940-41 and 42.

Obligations of Lessee: To pay all taxes and assessments, insurance, operating costs, maintenance costs, repair and replacement costs, and alterations, etc.

92 *Defendant's exhibit 4*

OPERATING EXPENSE

5025 W. 65th St., Clearing (Chicago)

Expense	1940		1941		1942	
	Cost per sq. ft. per year	12 Months	Cost per sq. ft. per year	12 Months	Cost per sq. ft. per year	12 Months
Salaries and wages	$.05160	$10,105.55	$.04341	$8,501.09	$.04181	$8,188.24
Materials and supplies	.00033	64.88	.00034	67.98	.00020	39.35
Rent and house service	.27900	54,834.92	.28075	54,982.49	.27850	54,553.32
Power, light, water	.02655	5,572.21	.02618	5,127.81	.01878	3,678.59
Heat	.02646	5,163.20	.03315	6,492.70	.04945	9,684.16
Insurance	.00237	464.23	.00209	409.16	.00142	277.46
Taxes	.01709	3,348.06	.01155	2,262.87	.01595	3,124.33
Amortization	.01545	3,026.49	.01008	1,974.60	.01008	1,974.60
Depreciation	.00213	418.56	.00213	418.56	.00090	176.54
Maintenance and repairs	.00336	659.75	.01009	1,977.16	.00156	364.54
Misc. (realtor's commission)					.01339	2,622.29
Total 195,840 sq. ft.	.42704	83,657.85	.41977	82,215.33	.43240	84,683.42

93 *Defendant's Exhibit 6.*

SUMMARY OF SUBLEASE OF PORTION OF 5025 W. 65TH ST., AT LAVERNE, CLEARING, ILL.

Sublessor—General Motors Corporation.
Sublessee—United States of America.
Term—January 1, 1942 to June 30, 1942 and extended to June 30, 1943.
Area—102,167 sq. ft.
Annual Rental—$40,866.80, which includes heat and water and figures at the rate of 40¢ per square foot per year.
Obligations of the Sublessee:
To repair and maintain the sidetracks located to the south of the building.

In the District Court of the United States

[Caption—48126.]

Verdict

Filed Jan. 22, 1943

We, the jury, impaneled and sworn in the above-entitled cause, do find and report that the just compensation which the petitioner shall make for the taking of the property described in the petition for condemnation, for the term from June 19, 1942 to June 30, 1943, is the sum of $38,597.86.

EVERETT E. VAN HOUTEN,
Foreman.
EDWIN SCHMIDT.
DON VON DE BOGERT.
WILLIAM E. JONES.
ARTHUR E. GABEL.
IRMA KUFER.
MURIEL SMITH.
LOUISE BECK.
ALBINA HRUSKA.
BARBARA SOUSETK.
MARION MALONE.
ETHYL HALL.

94 In the District Court of the United States

[Caption—48126.]

Present: Honorable MICHAEL L. IGOE, District Judge.

Judgment

Entered Jan. 22, 1943

This being the day to which this cause was continued for further trial again come the parties by their attorneys respectively and the Jury having heard the evidence of the parties arguments of counsel and the instructions of the Court retire to their room to consider of their verdict and evidence read into open Court and upon their oath do say We the jury impaneled and sworn in the above entitled cause do find and report that the just compensation which the petitioner shall make for the taking of the property described in the petition for condemnation for the term from June 19, A. D. 1942 to June 30, A. D. 1943 is the sum of $38,597.86.

It is ordered that said verdict be filed by the Clerk of this Court and that the Jury be and is hereby discharged. It is therefore considered and ordered by the Court that the plaintiff United States of America pay to the General Motors Corporation the sum of $38,597.86 just compensation for the taking of the property described in the petition for condemnation herein.

95 In the District Court of the United States

[Caption—48126.]

Order vacating judgment

Entered Jan. 26, 1943

By Stipulation of the United States of America, petitioner herein, by J. Albert Woll, United States Attorney for the Northern District of Illinois, and Clearing Industrial District, by its attorneys, Winston, Strawn and Shaw, and Walter H. Jacobs, and General Motors Corporation, by its attorneys, Taylor, Miller, Busch and Boyden and Harry S. Benjamin.

It Is Ordered that the minute order "to enter judgment on the verdict decreeing that the United States pay the sum of $38,597.86 to General Motors Corporation" be and the same is hereby vacated.

Entered at Chicago, Illinois, this 26th day of January, A. D. 1943.

IGOE,
United States District Judge.

J. ALBERT WOLL,
J. Albert Woll,
United States Attorney.

WINSTON, STRAWN & SHAW,
WALTER H. JACOBS,
Attys. for Clearing Industrial Dist.

TAYLOR, MILLER, BUSCH & BOYDEN,
Attys. for General Motors Corporation.

96 In the District Court of the United States

[Caption—48126.]

Order re original exhibits

January 29, 1943

On motion of defendant General Motors Corporation, by its attorneys, it is ordered that leave be and the same is hereby given to withdraw its original exhibits and to substitute photostatic copies therefore and that the time for filing motion for a new trial be and the same is hereby extended until ten (10) days after the entry of final judgment herein.

In the District Court of the United States

[Caption—48126.]

Notice of motion to amend petition

Filed Feb. 1, 1943

To HARRY S. BENJAMIN, *Legal Department, General Motors Corporation, Detroit, Michigan.*

TAYLOR, MILLER, BUSCH & BOYDEN,
134 So. LaSalle St., Chicago.

WALTER H. JACOBS and WINSTON, STRAWN & SHAW,
38 So. Dearborn St., Chicago.

Please take notice that on Monday, February 1, 1943, at ten o'clock A. M., or as soon thereafter as counsel may be heard, I shall appear before the Honorable Michael L. Igoe, Judge of the United States District Court, in the room usually occupied by

him as a courtroom, in the United States Court House at Chicago, Illinois, or before any other Judge who may then and there be sitting in his place and stead, and shall move the Court for leave to file an Amendment to the Petition for Condemnation and
97 will file a Declaration of Taking and deposit the estimated compensation stated in said Declaration with the Clerk of said Court (a copy of said Amendment to the Petition for Condemnation is served herewith), at which time and place you may appear if you so see fit.

J. ALBERT WOLL,
J. Albert Woll,
United States Attorney,
450 U. S. Court House, Chicago, Illinois.

Dated at Chicago, Illinois, this 28th day of January 1943.
(Affidavit of Mailing not copied.)

IN THE DISTRICT COURT OF THE UNITED STATES

[Caption—48126.]

Order re amendment to petition

Entered Feb. 1, 1943

This cause coming on to be heard upon the motion of the United States of America, petitioner herein, by J. Albert Woll, United States Attorney for the Northern District of Illinois, upon due notice to all parties of record, and the Court being fully advised in the premises,

It is ordered, that leave be and is hereby granted the petitioner to file their Amendment to the Petition for Condemnation instanter.

Entered at Chicago, Illinois, this 1st day of February A. D. 1943.

IGOE,
United States District Judge.

98 IN THE DISTRICT COURT OF THE UNITED STATES

[Caption—48126.]

Amendment to the petition for condemnation

Filed Feb. 1, 1943

To the Honorable Judges of the District Court of the United States of America for the Northern District of Illinois:

Now come the United States of America, by J. Albert Woll, United States Attorney for the Northern District of Illinois, at

the direction of and on behalf of the Attorney General of the United States of America, and leave of Court having been first obtained, file this, their Amendment to the Petition for Condemnation herein, and respectfully represent unto the Court as follows:

That the Secretary of War has, by letter to the Attorney General of the United States, requested that the estate taken in the lands described herein be amended to:

A term for years, subject to existing easements for public roads and highways, for public utilities, for railroad and for pipe lines, said term for years expiring June 30, 1943, renewable for additional yearly periods thereafter during the existing national emergency at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof.

Wherefore, the United States of America pray as formerly.

J. ALBERT WOLL,
J. Albert Woll,
United States Attorney.

99 In the United States District Court

[Caption—48126.]

Declaration of taking

Filed Feb. 1, 1943

To the Honorable, The United States District Court:

I, Henry L. Stimson, Secretary of War of the United States, do hereby declare that:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931, (46 Stat. 1421, 40 U. S. C. sec. 258 a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241); April 11, 1918 (40 Stat. 518; 50 U. S. C. sec. 171), and March 27, 1942 (Public Law 507—77th Congress), and the Act of Congress approved April 28, 1942 (Public Law 528—77th Congress), which Act appropriated funds for such purposes.

(b) The public uses for which said lands are taken are as follows:

The said lands are necessary adequately to provide for storage space and for related military purposes. Said lands include the General Motors Building, Chicago, Illinois, and have been selected

by me for acquisition by the United States for use as a signal corps depot, and for such other uses as may be authorized by Congress or by Executive Order, and are required for immediate use.

2. A general description of the lands being taken is set forth in Schedule "A" attached hereto and made a part hereof and is a description of the same lands described in the petition in the above entitled cause.

3. The estate taken for said public uses is a term for years in the lands described therein, subject to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, said term for years expiring June 30, 1943, renewable for additional yearly periods thereafter during the existing national emergency at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof.

4. A plan showing the lands is annexed hereto as Schedule "B" and made part hereof.

5. The sum estimated by me as just compensation for said land, with all buildings and appurtenances thereto, and including any and all interest hereby taken in said lands, for the term ending June 30, 1943 is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the Registry of said Court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said lands will probably be within any limits prescribed by law as the price to be paid therefor.

In witness whereof, the petitioner, by its Secretary of War, thereunto authorized, has caused this Declaration to be signed in its name by said Henry L. Stimson, Secretary of War, this the 19th day of January, A. D. 1943, in the City of Washington, District of Columbia.

HENRY L. STIMSON,
Secretary of War of the United States.

Schedule "A"

The land which is the subject matter of the Declaration of Taking aggregates 93,673 square feet, more or less, situate and being in the County of Cook, State of Illinois. A description of the land taken, together with the names and addresses of the purported owners thereof and a statement of the sum estimated to be just compensation therefor is as follows:

Description.—93,673 square feet of floor space, in the premises known and described as 5001 West 65th Street and 6510 to 6540

South Lavergne Avenue, and being the Westerly portion of
101 the one story building located at the Southwest corner of 65th Street and Lavergne Avenue, in the City of Chicago, Cook County, State of Illinois, and being that portion of the one story building not presently under lease to the United States.

Names and addresses of purported owners—Clearing Industrial District, Inc., a Delaware Corporation, 38 South Dearborn Street, Chicago, Illinois, General Motor Corporation (lessee) a Delaware Corporation, Argonaut Realty Division, Detroit, Michigan.

Estimated compensation for the term commencing June 8, 1942 and ending June 30, 1943—$34,761.66.

Schedule "B"

Name of owner: Clearing Industrial District, Inc.

Field work by: Harry S. Cutmore & Associates, Inc.

Date: 12/11/42.

Description of tract: Part of SW¼NE¼, Sec. 21, T38 N, R. 13 E. of 3d P. M. Cook Co., Illinois.

(See Schedule "A" for detailed legal description.)

(Herein was included a drawing made to scale describing the above tract.)

I certify that this is an accurate map of tract _____, based on Legal Description which shows this tract to contain 7.1 acres.

R. B. OGDEN.
Name
Assoc. Eng.
(Title)
January 5, 1943
(Date)

102 IN THE DISTRICT COURT OF THE UNITED STATES

[Caption—48126.]

Order for disbursement

Entered Feb. 12, 1943

This cause coming on to be heard upon the motion of General Motors Corporation, defendant herein, by its attorneys, Taylor, Miller, Busch & Boyden, and Harry S. Benjamin, upon due notice to all parties of record, and the Court being fully advised in the premises,

It is ordered that the Clerk of this Court disburse on account of the just compensation to make in this proceeding. To: General

Motors Corporation—$34,761.66, without prejudice to any rights of the General Motors Corporation, including the right of appeal.

Entered at Chicago, Illinois, this 12th day of February A. D. 1943.

IGOE,
United States District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES

[Caption—48126.]

Judgment

Entered Feb. 12, 1943.

This cause having come on for trial, upon due setting, and the United States of America, petitioner herein, having appeared in open Court by Clarence W. Beatty, Jr., Special Assistant to the United States Attorney for the Northern District of Illinois, J. Albert Woll, and the defendant, General Motors Corporation, having appeared by Preston Boyden, of the firm of Taylor, Miller, Busch & Boyden, and Harry S. Benjamin, its attorneys, and the defendant, Clearing Industrial District, Inc., having appeared by Walter H. Jacobs, of the firm of Winston, Strawn and Shaw, its attorneys, and a jury having been selected, empaneled, and sworn, and having heard the evidence adduced, the arguments of counsel, and the instructions of the Court, returned its verdict fixing the just compensation for the taking of the leasehold interest in the property described in the petition for condemnation for a term from June 19, 1943 to June 30, 1943, in the sum of $38,597.86; and

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Upon the motion of the petioner, the United States of America, by their attorney, to enter judgment on the verdict, the Court

Finds: That said cause has been regularly conducted, and that this Court has jurisdiction of the property described and the parties named herein, and that pursuant to the order entered herein on June 8, 1942, the defendant, General Motors Corporation, was deprived of its possession of said property on June 19, 1942; and that by reason of the delay in payments for the use and occupancy of said property as a matter of law, the amount of the compensation shall bear interest as hereinafter adjudged.

Now, therefore, the Court being fully advised in the premises,

It is ordered, adjudged, and decreed by the Court that the just compensation which the United States of America shall make for the taking of the real estate described herein for the term from June 19, 1942 to June 30, 1943, including heat and water, is the

sum of $38,597.86, together with interest at the rate of 5% per annum on the amounts of the rent for the months of 1942 and from the dates, viz.:

$1,128.66	June	July 1, 1942
3,122.43	July	August 1, 1942
3,122.43	August	September 1, 1942
3,122.43	September	October 1, 1942
3,122.43	October	November 1, 1942
3,122.43	November	December 1, 1942
3,122.43	December	January 1, 1943

to January 31, 1943.

It is further ordered, adjuged, and decreed by the Court that this judgment is satisfied to the extent of the sum of $34,761.66, the amount of the estimated compensation for the term commencing June 8, 1942 and ending June 30, 1943, deposited
104 in the Registry of this Court at the time of the filing of the declaration of taking herein, and

It is further ordered that upon the payment of the sum of $3,836.20, together with said interest, this judgment shall be satisfied in full.

It is further ordered that jurisdiction of this case is retained for the purpose of ascertaining the compensation for any damages to the property caused by the use of the United States of America, its officers, agents, and employees, which are in excess of ordinary wear and tear upon said property.

Entered this 12th day of February A. D. 1943.

IGOE,
United States District Judge.

To the allowance of interest and reservation of jurisdiction, the United States of America, by counsel, duly objects and excepts.

To all of which General Motors Corporation, defendant herein, by its counsel, duly objects and excepts.

In the District Court of the United States

[Caption—48126.]

Motion for new trial

Filed Feb. 23, 1943

Defendant, General Motors Corporation, moves the court to set aside the verdict returned in the above entitled cause on January 22, 1943, and the judgment entered thereon on February 12, 1943, and to grant defendant a new trial on the following grounds:

1. The court erred in refusing to admit evidence of the expenses incurred by the defendant, General Motors Corporation, with reference to wages and salaries, freight expenses, separation and vacation allowance expenses, the cost of materials and supplies, traveling expenses, telephone and telegraph charges, rental of storage facilities and destruction of bin equipment, all of
105 which directly resulted from the taking by the United States of America of the leasehold interest of General Motors Corporation in the premises involved in the above action.

2. The court erred insustaining the objection of the petitioner, United States of America, to the offer of the defendant, General Motors Corporation, to prove that said defendant incurred certain expenses for wages, salaries, freight, separation and vacation allowances, materials, supplies, telephone, telegraph, traveling, rental and storage, and expense resulting from the destruction of certain bin equipment, all of which directly resulted from the taking by the United States of America of the leasehold interest of General Motors Corporation in the premises involved in the above action.

3. The court erred in refusing to instruct the jury, as requested by the defendant, General Motors Corporation, in accordance with the following instructions which were refused by the court:

"The court instructs the jury that in all cases where private property has been taken for public use, as has been done in the present instance, the compensation to which the lessee whose interest has been taken is entitled is the amount of money necessary to put the lessee in the same condition and position as it would have been had its property not been taken."

"The jury are instructed that the respondent, General Motors Corporation, is entitled to just compensation, which is that sum of money which would reimburse it for the expenses reasonably and necessarily incurred as a result of the taking of its interest in the condemned property; and you are further instructed that, in arriving at that sum you are entitled to consider the value of the leasehold interest, and the reasonable and necessary expenses incurred in the forced demolition of its property and in moving."

"The court instructs the jury that in determining the costs of moving respondent's business and the direct damage to respondent's property, both of which are part of the just compensation to which General Motors Corporation is entitled under the Constitution, you may take into consideration salaries, wages, freight, and other expenses which were reasonably incurred by respondent and which were the direct result of the condemnation you are here considering."

106 "The jury are instructed that, in arriving at the just compensation to be awarded to the defendant herein, you are to consider what it has lost as a result of this action on the part of the government and you are not to base your considerations and deliberations upon what the government has gained thereby."

4. In view of the fact that the jury was not permitted to consider the offered evidence, testimony, and jury charges, pertaining to the tiems and subjects mentioned in paragraphs "1", "2" and "3" of this motion for new trial, the amount of the verdict is inadequate and does not fulfil the requirement of the Fifth Amendment of the Constitution of the United States of Ainerica that there be just compensation for property taken for public use.

PRESTON BOYDEN,
HARRY S. BENJAMIN, JR.,
Attorneys for Defendants, General Motors Corporation.

In the District Court of the United States

[Caption—48126.]

Order overruling motion for new trial

February 23, 1943

It is ordered by the Court that the motion of the defendant General Motors Corporation to grant a new trial be and the same is hereby overruled.

107 In the District Court of the United States for the Northern District of Illinois, Eastern Division

No. 48126

UNITED STATES OF AMERICA, PETITIONER

vs.

93.673 SQUARE FEET OF FLOOR SPACE, MORE OR LESS, IN CHICAGO, COOK COUNTY, ILLINOIS, CLEARING INDUSTRIAL DISTRICT, INC., GENERAL MOTORS CORPORATION AND ARGONAUT REALTY DIVISION, DEFENDANTS

Notice of appeal

Filed May 12, 1943

Notice is hereby given that General Motors Corporation, defendant above named, hereby appeals to the Circuit Court of Ap-

peals for the Seventh Circuit from the final judgment entered in this action on February 12, 1943.

Dated May 12, 1943.

PRESTON BOYDEN,
HARRY S. BENJAMIN,
HENRY M. HOGAN,
Attorneys for Appellant.

HENRY M. HOGAN,
Detroit, Michigan,

TAYLOR, MILLER, BUSCH & BOYDEN,
134 South LaSalle Street, Chicago, Illinois,
Of Counsel.

108 In the District Court of the United States

[Caption—48126.]

Statement of points

Filed May 17, 1943

The points upon which appellant intends to rely on this appeal are as follows:

(1) The Court erred in refusing to admit evidence of the expenses incurred by the defendant, General Motors Corporation, with reference to wages and salaries, freight expenses, separation and vacation allowance expenses, the cost of materials and supplies, traveling expenses, telephone and telegraph charges, rental of storage facilities, destruction of bin equipment and other miscellaneous expense, all of which directly resulted from the taking by the United States of America of the leasehold interest of General Motors Corporation in the premises involved in the above action.

(2) The Court erred in sustaining the objection of the petitioner, United States of America, to the offer of the defendant, General Motors Corporation, to prove that said defendant incurred certain expenses for wages, salaries, freight, separation and vacation allowances, materials, supplies, telephone, telegraph, traveling, rental and storage, and expense resulting from the destruction of certain bin equipment, all of which directly resulted from the taking by the United States of America of the leasehold interest of General Motors Corporation in the premises invoived in the above action.

(3) The Court erred in refusing to instruct the jury, as requested by the defendant, General Motors Corporation, in accord-

ance with the following instructions which were refused by the Court:

"The court instructs the jury that in all cases where private property has been taken for public use, as has been done in the present instance, the compensation to which the lessee whose interest has been taken is entitled is the amount of money necessary to put the lessee in the same condition and position as it would have been had its property not been taken."

"The jury are instructed that the respondent, General Motors Corporation, is entitled to just compensation, which is that
109 sum of money which would reimburse it for the expenses reasonably and necessarily incurred as a result of the taking of its interest in the condemned property; and you are further instructed that, in arriving at that sum, you are entitled to consider the value of the leasehold interest, and the reasonable and necessary expenses incurred in the forced demolition of its property and in moving."

"The court instructs the jury that in determining the costs of moving respondent's business and the direct damage to respondent's property, both of which are part of the just compensation to which General Motors Corporation is entitled under the Constitution, you may take into consideration salaries, wages, freight and other expenses which were reasonably incurred by respondent and which were the direct result of the condemnation you are here considering."

"The jury are instructed that, in arriving at the just compensation to be awarded to the defendant herein, you are to consider what it has lost as a result of this action on the part of the government and you are not to base your considerations and deliberations upon what the government has gained thereby."

(4) The Court erred in overruling the motion of defendant, General Motors Corporation, for a new trial.

PRESTON BOYDEN,
HENRY M. HOGAN,
HARRY S. BENJAMIN,
Attorneys for Appellant.

HENRY M. HOGAN,
Detroit, Michigan,
TAYLOR, MILLER, BUSCH & BOYDEN,
134 South LaSalle Street, Chicago, Illinois,
Of Counsel.

110 In the District Court of the United States

[Caption—48126.]

Designation of record

Filed May 17, 1943

Appellant designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal in this action:

1. All process issued in this cause;
2. Petition for condemnation filed on June 8, 1942;
3. Order entered June 8, 1942, granting immediate possession to the United States of America;
4. Appearance of Industrial District, Inc., filed June 30, 1942;
5. Appearance of General Motors Corporation, filed July 1, 1942;
6. Order entered November 23, 1942, giving Preston Boyden and Morris Leibman leave to file their appearance as additional counsel for General Motors Corporation;
7. Appearances of Preston Boyden and Morris Leibman as additional counsel for General Motors Corporation, filed November 23, 1942;
8. Pages 1 to [illegible] inclusive, of the stenographic report of the proceedings herein, two copies of which are filed herewith;
9. Petitioner's Exhibits 1 and 2 and Defendants' Exhibits 1 to 6, inclusive;
10. All instructions to the jury tendered to the Trial Court;
11. Verdict of the jury filed January 22, 1943;
12. Judgment entered upon the verdict on January 22, 1943;
13. Judgment entered January [illegible]6, 1943, vacating judgment entered upon the verdict on January 22, 1943;
14. Order entered January 29, 1943, giving leave to General Motors Corporation to withdraw its original exhibits and to substitute photostatic copies therefor, and extending time for filing motion for new trial until ten days after the entry of the final judgment;
15. Notice filed herein on February 1, 1943 by the United States Attorney;

111 16. Motion of United States Attorney for leave to file an amendment to petition for condemnation, filed February 1, 1943;

17. Order of February 1, 1943, giving leave to plaintiff to file instanter an amendment to the petition for condemnation;
18. Amendment to petition for condemnation filed February 1, 1943;

19. Declaration of taking filed February 1, 1943;
20. Order entered February 12, 1943, directing Clerk of Court to pay to General Motors Corporation the sum of $34,761.66;
21. Judgment order entered February 12, 1943, decreeing that the just compensation for the taking of real estate herein by the Government is $38,597.86, together with interest at the rate of 5%;
22. Motion for new trial filed February 23, 1943, by defendant, General Motors Corporation;
23. Order entered February 23, 1943, overruling motion of defendant, General Motors Corporation, to grant a new trial;
24. Notice of appeal filed on May 12, 1943;
25. Statement of points on which appellant intends to rely;
26. This designation.

PRESTON BOYDEN,
HENRY M. HOGAN,
HARRY S. BENJAMIN.

HENRY M. HOGAN,
Detroit, Michigan,

TAYLOR, MILLER, BUSCH & BOYDEN,
134 South LaSalle Street, Chicago, Illinois,
Of Counsel.

112–113 [Clerk's certificate to foregoing transcript omitted in printing.]

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the sixth day of October, in the year of our Lord one thousand nine hundred and forty-two, and of our Independence, the one hundred and sixty-seventh.

8331

GENERAL MOTORS CORPORATION, APPELLANT

vs.

THE UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

And, to wit: On the eleventh day of February 1944, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to wit:

February 11, 1944.

Before MAJOR, KERNER, and MINTON, Circuit Judges.

MAJOR, Circuit Judge. This is an appeal from a condemnation judgment, entered February 12, 1943. The suit was commenced by the United States on June 8, 1942, to acquire the temporary use of a part of defendant's warehouses needed in connection with the establishment by the War Department of a Signal Corps depot in Chicago. On January 1, 1942, the government subleased about half of the warehouse from the defendant. There is involved in this proceeding the remainder of the warehouse, or 93,673 square feet.

The building involved is a single large, one-story building, located at the southwest corner of 65th Street and Lavergne Avenue in the Clearing district. The property condemned was being used by the defendant as its master warehouse for the storage and distribution of Buick, Oldsmobile, Pontiac, and Chevrolet parts. Defendant had installed equipment on the premises costing approximately $101,000, consisting mostly of bins and other facilities for the necessary operation of its business. At the time of the taking there was located on the premises an inventory of about $50,000 of parts and machinery. About one week after the suit was filed, defendant was notified by an agent of the government that it was trespassing upon government property and if defendant did not vacate, soldiers would be called in and move defendant out on the street. The business was discontinued, and some five weeks were spent in moving the property and in preparing the space for the government's use. Much of the property could not be moved and was demolished. The expense incurred in preparing

the property for the government's use was borne by the defendant. The use condemned was for a period of one year, out of an unexpired lease of approximately six years.[1]

Authority for the condemnation is contained in Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, 50 U. S. C. A. (App.) Sec. 632, which provides: "The Secretary of War * * * may cause proceedings to be instituted * * * to acquire by condemnation any real property, temporary use thereof, or other interest therein * * * that shall be deemed necessary, for military * * * or other war purposes * * *." The petition for condemnation, in conformity with the provision just quoted, described a designated number of square feet of floor space and prayed for an order "condemning the temporary use in the real property herein described" for a term of years ending June 30, 1943.

The case was tried to a jury and the government there, consistent with its position here, proceeded on the theory that such compensation was limited to the fair market rental value of the floor space condemned. The trial court apparently accepted this theory and submitted the cause to the jury on this basis. The defendant offered certain proof, admission of which was denied by the court, as to the expense and damages attributable solely to the operation of demolition and moving necessitated by the government's taking. We do not understand defendant to contend that it was entitled to recover these expenditures as such, but that proof of the same was admissible as an element of the fair value of the property taken. Thus the sole issue is whether the defendant was entitled to offer proof as to the expense so incurred as an element of "just compensation" guaranteed by the Fifth Amendment of the Constitution of the United States.

After studying the numerous authorities called to our attention, as well as others, we are convinced that the question for decision is a difficult one. There is a scarcity of authorities dealing with a same or similar situation. We are of the view that the opposing contentions arise largely because of a failure to recognize the exact nature of the property of which defendant was deprived. The government's case is predicated upon the basis that the property taken was merely the use of naked floor space, without any consideration to the fact that defendant was in possession of and was using said space in its business as a going concern. Consistent with this theory, it is contended by the government that the measure of defendant's compensation is only the fair rental

[1] Subsequent to the trial, an amendment to the petition for condemnation was filed which changed the one-year period contemplated to that of a term for years expiring June 30, 1943, renewable for additional yearly periods thereafter during the existing national emergency, at the election of the Secretary of War. We do not understand, however, that this amended petition has any bearing upon the issues before the court below or here.

value of such space in its naked form. In other words, according to the government's theory, and it was so argued before this court, the measure of compensation in a case of this character is the same whether the floor space taken be occupied or vacant. This theory, no doubt, is consistent with the use procured by the government, but not that which was taken from the defendant. In this connection, it must be kept in mind that it was defendant's use which was condemned and not merely a one-year part of its term lease. This is so even though defendant's interest in the property stemmed from the lease. It may also be noted that defendant had something more than the right to use, as would be the case where the property of a lessee was unoccupied. Here, the right to use had been exercised and such right was merged in the actual and physical possession of the property. The pertinency of this discussion resides in the fact that compensation is to be measured by the condemnee's loss, that of which he is deprived, and not by the taker's gain, that which he acquires. *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 76.

We agree with the lower court's characterization of the government's theory as "hard law." We go further and express the view that it should not be accepted in the absence of definite and controlling authority. The government cites many cases in support of principles usually applicable in condemnation suits. None of them, however, are based upon the unusual facts of the instant case with the possible exception of *Gershon Bros. Co.* v. *United States*, 284 Fed. 849. It would unduly prolong our discussion to analyze and distinguish such cases. We shall refer to only a few of the more important. Much stress is placed upon the recent case of *United States* v. *Miller et al.*, 317 U. S. 369. It is true the court in that case applied the generally accepted concept of market value. In doing so, however, it appears to have recognized cases requiring a different test. On page 373, the court stated:

"It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose."

The court also, on the same page, in discussing the "just compensation" clause of the Constitution, said:

"Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."

In support of this statement, a number of cases are cited in the footnote, including *Seaboard Airline Ry. Co.* v. *United States*, 261 U. S. 299, and *United States* v. *New River Collieries Co.*, 262 U. S. 341. In the latter case, the government requisitioned bituminous

coal for use in the Navy. The court, in discussing just compensation, on page 345 said:

"The owner was entitled to what it lost by the taking. That loss is measured by the money equivalent of the coal requisitioned. * * * The owner had a right to sell in that market (export market), and it is clear that it could have obtained the prices there prevailing for export coal. It was entitled to these prices."

In the *Seaboard* case, the court (page 304), in stating the same general rule, said it was based on "equitable principles" and added:

"He (condemnee) is entitled to the damages inflicted by the taking. (*Northern Pacific Ry. Co.* v. *North American Tel. Co.*, 230 Fed. 247.)"

In the *Northern Pacific* case, the Telegraph Company sought to take from the Railway Company the right to use the latter's right of way for a telegraph line. The court, after determining that there was no market value for such lease or use of the Railway Company's right of way, on page 372 stated:

"Now, where real property about to be taken by condemnation has no market value, the amount of rent, or of income it has produced, and is producing, and is capable of producing, and the opinions of men who have had experience in dealing in it and have knowledge of its value, are competent and material evidence to determine what is just compensation for its taking; in other words, what damages will be inflicted by that taking?"

Other cases where the fair market value rule has been applied are those of *Olson* v. *United States*, 292 U. S. 246, 255, and *United States* v. *Meyer*, 115 Fed. (2d) 387, 397, both of which recognize that the condemnee is entitled to be put in as good position pecuniarily as if his property had not been taken. Cases are also cited wherein it has been held expenses incurred by an owner in moving his personal property or business from the premises condemned are not compensable. *Joslin Co.* v. *Providence*, 262 U. S. 668, 675; *Potomac Elec. Power Co.* v. *United States*, 93 Fed. (2d) 243, 249; *Futrovsky* v. *United States*, 66 Fed. (2d) 215, 216. All of these cases involved the condemnation of land and no doubt are authority for the government's position under a similar state of facts. In both the *Potomac* and *Futrovsky* cases, however, the rule was applied on the theory that the fixtures could be removed without substantial injury either to the real estate (the property taken) or to the fixtures.

Mitchell v. *United States*, 267 U. S. 341, 345, and *Bothwell* v. *United States*, 254 U. S. 231, are cited in support of the proposition that neither damages to nor complete destruction of a business conducted on the premises taken constitutes a taking of property. In each of these cases, it was land which was taken, and it was

held that the damage to the business was consequential to which the condemnee was not entitled. The court in the *Mitchell* case, however, stated (page 344):

"The special value of land due to its adaptability for use in a particular business is an element which the owner of land is entitled, under the Fifth Amendment, to have considered in determining the amount to be paid as the just compensation upon a taking by eminent domain."

The government cites a number of authorities in support of its theory that the rule of fair market value should be applied in ascertaining the value of a leasehold interest. We have examined such cases and think *Gershon Bros. Co.* v. *United States*, 284 Fed. 849, is the only one which supports such theory. Admittedly, the facts of that case are quite similar to those here. Warehouse space held and occupied by the condemnee under a lease was requisitioned by the government. The plaintiff sought to recover, in addition to the fair rental value of the property taken, the alleged difference in rent between the premises vacated and those into which plaintiff moved, the amount of expense of moving plaintiff's stock from one warehouse to the other, and for other incidental expense incurred in moving. The court (page 850) held:

"The 'just compensation' to which the plaintiff was entitled is measured by the market value of its property taken. It was not entitled to more than that because its expenses were increased in consequence of moving its business to another place."

In our view, this statement is unsound for the reason that it fails to take into account the nature of the property of which the condemnee was deprived. Evidently the court treated the property taken as merely a lease, or at any rate, the right of use in unoccupied property. So far as the facts are disclosed by the opinion, the property taken from the condemnee, however, was the actual use and possession as distinguished from a right to use.

The Federal cases relied upon by the defendant are little, if any, more helpful than those relied upon by the government. Its strongest point perhaps lies in the general principle stated in the *Miller* and other cases, *supra*, to the effect that the condemnee is to be put in as good position pecuniarily as he would have occupied if his property had not been taken. A number of cases are cited, however, wherein the cost of removing personal property has been allowed, either as a measure of compensation or as an element thereof. Among such cases are *National Laboratory and Supply Co.* v. *United States*, 275 Fed. 218; *United States* v. *Wiener*, 210 Fed. 832; *C. M. & St. P. Ry. Co.* v. *Hock*, 118 Ill. 587; *Metropolitan West Side Elev. R. Co.* v. *Siegel*, 161 Ill. 638; *McMillin Printing Co.* v. *Pittsburgh C. & W. R. Co.*, 216 Pa. 504, 65 Atl.

1091; and *Des Moines Wet Wash Laundry* v. *Des Moines*, 197 Iowa 1082, 198 N.W. 486. It is true, as the government points out in the *National Laboratory* case, the court merely followed the measure of damages invoked by the parties. The *Wiener* case has little relevancy to the instant question, but, strange as it may seem, the government there urged that the only damage to the owners of the plant condemned was the expense of taking the machinery down, removing it and setting it up in a new location. We realize, in view of what was said in the *Miller* case, *supra* (page 379), that State court decisions are not controlling, but in the absence of a more definite Federal rule applicable to the instant situation, we think they are worth noting.

In the *Hock* case, the court (page 590) stated:

"The inconvenience and cost of removal of the business from the premises condemned, are mentioned as elements of damages proper for consideration. This, however, is in harmony with the ruling in *St. Louis, Vandalia, Terre Haute Railroad Company* v. *Capps*, 67 Ill. 607."

In the *Siegel* case, the same court (page 618) said:

"If * * * the loss and expense of removal enter into and help to make up the market value when the sale is voluntary, we see no reason why the same elements should not help to make up the market value when the sale is compulsory."

The government contends that these cases have been discredited by a later decision of the same court in *Braun* v. *Metropolitan West Side Elev. R. R. Co.*, 166 Ill. 434. This characterization is hardly accurate. True, the court in the latter case pointed out that its previous decisions in the *Hock* and *Siegel* cases were the result of the theory on which the cases were tried in the courts below. The court, however, after stating the fair market rule, recognizes exceptions thereto by stating (page 438):

"* * * and whenever a consideration of matters of personal inconvenience to the owner, loss of profits, damage to personal property and cost of removal, is permissible, it must be when a sufficient foundation therefor has been laid, so that their consideration simply aids the jury and court in determining the fair cash value of the property, in view of its present use. There is nothing in this case to bring it within any exception to the general rule."

In that case, only a part of a tract of land was condemned and the court thought there was no showing that the condemnee's business could not be conducted upon that portion not taken, and for this reason the exception to the general rule could not be given effect.

Of the cases cited by the defendant, the *McMillin* case is the nearest in point. After stating the general fair market rule, the court said (page 1094, Atl.):

"But market value is an unsatisfactory test of the value to a tenant of a leasehold interest. It is really no test at all because a lease rarely has any market value. Generally it is not assignable at the will of the tenant, and he pays in rent all that the right of occupation is worth. The right of which he is deprived, and for which he is entitled to full compensation is the right to remain in undisturbed possession to the end of the term. The loss resulting from the deprivation of this right is what he is entitled to recover. The value of the right he is forced to sell cannot ordinarily be measured by its market price, for there is no market for it; nor can it always be measured by the difference between the rent reserved and the rental value, if the lease should be a favorable one. If, as was the case here, a tenant, engaged in a business requiring the use of heavy machinery and appliances, should secure a new place equally well adapted to his business, and at the same rent, he would still be at the expense of removal and at a loss because of the stoppage of his business. These are matters to be considered in connection with others, not as substantive elements of damage, but as tending to prove the value of the leasehold interest."

Again, as pointed out by the government, this case was tried in the court below on the theory that the cost of removing machinery should be allowed. The government also suggests that the *McMillin* case is of doubtful validity due to a later decision of the same court, *Iron City Auto Co.* v. *Pittsburgh*, 253 Pa. 478, 98 Atl. 679. We do not so read this latter case; in fact, the court appears to have reaffirmed the *McMillin* case. On page 681 (Atl.), the court, in discussing the *McMillin* case, stated:

"* * * the tenant was allowed to recover the expenses of the compulsory removal of machinery. We did not, however, permit this as a separate 'item' of damage, but merely as 'a proper element' to be considered in fixing the value of the leasehold. In other words, our underlying thought appears to have been: If a purchaser had appeared upon the scene to take over the lease, the fact that the holder thereof would be obliged to remove the business with the machinery to another location would, of course, cause the prospective lessee to diminish his bid for the balance of the term accordingly; hence the cost of removal and the depreciation in value of the machinery were proper elements for consideration and deduction in measuring the value of the lease."

It is pertinent to observe that the unfairness of applying the fair market rule in the instant case is even more apparent than in the *McMillin* case, for the reason that the use condemned here is only for one year out of a lease which had five years more to run, while there the entire lease was taken.

Another case based on facts similar to those of the instant case is that of *Des Moines Wet Wash Laundry* v. *Des Moines*, 197 Iowa 1082, 198 N. W. 486. In discussing the question, the court said (page 488 N. W.):

"The real right of which plaintiff is deprived in the exercise of eminent domain by the defendant, and for which, under the Constitution of the state, he is entitled to be compensated, is the right to remain in undisturbed possession and enjoyment to the end of the term.

"'The loss resulting from the deprivation of this right is what he is entitled to recover. The value of the right he is forced to sell cannot ordinarily be measured by its market price, for there is no market for it; nor can it always be measured by the difference between the rent reserved and the rental value, if the lease should be a favorable one. If, as was the case here, a tenant, engaged in a business requiring the use of heavy machinery and appliances, should secure a new place equally well adapted to his business, and at the same rent, he would still be at the expense of removal and at a loss because of the stoppage of his business. These are matters to be considered in connection with others, not as substantive elements of damage, but as tending to prove the value of the leasehold interest.'"

A pertinent observation is found in *United States* v. *Rocktold Co.*, 129 Fed. (2d) 473, 476, where the court quoted from a New York Court of Appeals case written by Judge Cardozo, as follows:

"'Condemnation' is an enforced sale, and the state stands toward the owner as buyer toward seller. On that basis the rights and duties of each must be determined. It is intolerable that the state, after condemning a factory or warehouse, should surrender to the owner a stock of second-hand machinery and in so doing discharge the full measure of its duty."

Phelps v. *United States*, 274 U. S. 341, is also worth noting, not so much because of what was decided as the proof which was considered in determining just compensation. There, the property condemned was the use of a pier in New York harbor held by the condemnee under a lease. The Supreme Court opinion discloses that the condemnee continued to pay rent to its lessor in the amount of $79,890.42, which was repaid to the condemnee by the United States. The condemnee, in addition, was allowed so much per month for the use of its property, in the amount of $254,175.79 over the amount of rent actually paid. The only question before the Supreme Court was whether the condemnee was entitled to interest from the time of taking or from the time of payment. The court decided it was from the time of taking, on the theory that the condemnee was "entitled to have the full equivalent of the value of such use at the time of the taking paid contemporane-

ously." This case went to the Supreme Court from the Court of Claims as *Howard Phelps, et al.*, 61 Ct. Cls. 1044. The facts regarding the case, however, and the basis for that court's decision are found in *Booth & Co.* v. *United States*, 61 Ct. Cls. 895. The findings describe the property taken, the terms and conditions of the lease, including the amount of rental the lessee (condemnee) was obliged to pay, the size of the pier and its facilities for accommodating ships. The findings also disclose the amount received by the condemnee from steamship companies for the use of the pier prior to the taking, as well as the amount received during the remainder of the year after the property was returned by the government to the owner. It was, therefore, upon the basis of the condemnee's income, both prior to the taking and after the property had been returned, that the fair value of the use taken was fixed and determined. The Court of Claims approved the award as thus determined, although, as stated, its propriety was not raised in the Supreme Court. The significant thing about these facts, so we think, is that the property taken was recognized by the government as the condemnee's use and its occupancy in the conduct of its business, and it was that use, as distinguished from a mere interest in the lease, for which compensation was awarded. No contention was made that just compensation should be limited to the fair rental value of the space condemned.

While we recognize that the question for decision is not free from doubt, we are of the view that fair rental value of the unoccupied space taken was not the equivalent of "just compensation," to which defendant was entitled. To so hold is to ignore that which was taken from the defendant, its use and occupancy of the premises. Suppose the defendant and the government had entered into a lease voluntarily. Certainly the cost of preparing the space for the government's use would have been a material item in the amount of rent agreed upon. If that cost had been borne by the defendant the government no doubt would have been willing to pay more rental, and if it had been borne by the government, defendant, for the same reason, would have been willing to accept less. We are unable to perceive why such cost should not also be taken into consideration where the acquisition is the result of condemnation. While we think that the fair market rental value of the unoccupied space was properly admissible as an element of such compensation, to hold that the defendant was entitled to nothing more is to hold that it was merely entitled to be relieved of the rental obligation owed to its lessor. This plainly ignores that which was taken from the defendant and is inequitable as well as unjust.

We, therefore, reach the conclusion that the defendant was entitled to prove, as an element of "just compensation," the actual

and necessary expense directly incurred in vacating the property condemned. It follows that defendant's offer of proof in this respect was erroneously excluded, and that the judgment must be and is hereby

Reversed.

MINTON, Circuit Judge, Dissenting. I cannot agree that the Government should be liable for the moving expense of the appellant. Dress the question up as you will, that is all that it amounts to.

That this case may be properly classified as one of "hard law" is no justification for departing from the true objective of a condemnation suit, namely, to fix the fair market value of the property taken.

In the case before us there was a going business, operating at a place, the warehouse. The Government took, for a time, the place, and not the business. The removal of the business was an expense that was consequential and was not an element of value of the warehouse taken.

I have never understood that the condemnor could be held liable for expense which the condemnee was put to in vacating the premises. The cases are against such an allowance. *Gershon Bros. Co.* v. *United States*, 284 Fed. 849; *City of St. Louis* v. *St. Louis, I. M. & S. Ry. Co.*, 266 Mo. 694, 182 S. W. 750; *Matter of New York, W. S. & B. Ry. Co.*, 35 Hun 633; *Mayor of Baltimore* v. *Gause & Bro.*, 132 Md. 290, 104 Atl. 429; *Rublet* v. *Concord Railroad Corp.*, 62 N. H. 561.

Let us suppose that the Government had in this case condemned the fee. It would have been liable to pay the fair market value of the fee taken. Would the Government have had to pay the appellant's moving expense? The majority concedes that it would not. With this, I agree. The cases support this view. *Joslin Mfg. Co.* v. *City of Providence*, 262 U. S. 668, 675, 43 S. Ct. 684, 67 L. Ed. 1167; *Potomac Electric Power Co.* v. *United States*, 85 F. 2d 243, 249; *Kutrovsky* v. *United States*, 66 F. 2d 215, 217. By what process of reasoning can it be said that the Government must pay that expense if it takes less than the fee?

The Government did not take the bins and other personal property which the appellant removed. That they might have been worth less after removal than when installed and that certain expense was incurred in their removal are no criteria of the value of the thing taken, namely, the warehouse space.

The Government is required to make the condemnee whole for the property taken, but not for the expense of getting out. The use to which property is being put, or could be put, is a proper consideration for court or jury in arriving at the market value,

but such use is not the thing taken. The taking may interrupt the business conducted on the premises, but that does not add to or detract from the value of the thing used. It is the thing used, namely, the warehouse space, that was taken, and not the use of the thing, namely, the business conducted in the warehouse. We seek the value of the thing used, not the value of the use of the thing. The expense of relinquishing the use of the thing from the thing used is not compensable as an element of value of the thing taken.

The judgment should be affirmed.

A true Copy.

Teste:

_____,

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

And on the same day, to wit: On the eleventh day of February 1944, the following further proceedings were had and entered of record, to wit:

Friday, February 11, 1944

Court met pursuant to adjournment.

Before: Hon. J. Earl Major, Circuit Judge. Hon. Otto Kerner, Circuit Judge. Hon. Sherman Minton, Circuit Judge

The United States of America, plaintiff

vs.

93,673 Squale Feet of Floor Space, etc., et al., defendants

8331

General Motors Corporation, appellant

vs.

The United States of America, appellee

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, and that this

cause be, and the same is hereby, remanded to the said District Court.

I, KENNETH J. CARRICK, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages contain a true copy of the Opinion filed on the eleventh day of February 1944, and the Judgment entered on the same day, in:

Cause No. 8331

GENERAL MOTORS CORPORATION, APPELLANT

vs.

THE UNITED STATES OF AMERICA, APPELLEE

As the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-first day of April A. D. 1944.

[SEAL]

KENNETH J. CARRICK,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1944

126 Supreme Court of the United States

Order allowing certiorari

Filed May 29, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice and Mr. Justice Murphy took no part in the consideration or decision of this application.

[Endorsement on cover:] File No. 48455. U. S. Circuit Court of Appeals, Seventh Circuit. Term No. 76. The United States of America, Petitioner *vs.* General Motors Corporation. Petition for a writ of certiorari and exhibit thereto. Filed May 3, 1944. Term No. 76 O. T. 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

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CHARLES ELMORE CROPLEY
CLERK

No. [redacted] 76

In the Supreme Court of the United States

OCTOBER TERM, 1943

UNITED STATES OF AMERICA, PETITIONER

v.

GENERAL MOTORS CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

GENERAL MOTORS CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered in this case on February 11, 1944, by the United States Circuit Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals (R. 114–123) is reported in 140 F. (2d) 873.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 11, 1944 (R. 124–125). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in a proceeding by the United States to acquire the temporary use of a business property, necessary expenses incurred by the lessee in vacating the premises constitute an element of "just compensation" within the Fifth Amendment.

STATUTE INVOLVED

Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, c. 199, sec. 201, 50 U. S. C. App., Supp. III, sec. 632, is set forth in the Appendix, *infra*, pp. 12–13.

STATEMENT

The United States on June 8, 1942, instituted proceedings under Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, sec. 201, 50 U. S. C. App., Supp. III, sec. 632 (Appendix, *infra*, pp. 12–13), to condemn, for a term ending June 30, 1943, a portion of a warehouse needed in connection with the establishment by the War Department of a Signal Corps depot in Chicago (R. 2–4, 83–85). An order granting immediate possession was entered on the same day (R. 5). General Motors Corporation, the lessee occupant of the premises, began moving out on June 19, 1942 (R. 69). At the trial before a jury, the sole issue was the amount of compensation to be paid for the term commencing June 19, 1942, and ending June 30, 1943 (R. 80, 93). The pertinent facts are as follows:

The warehouse was owned by the Clearing Industrial District, Inc., and had been leased to the General Motors Corporation in 1928 for a term ending May 31, 1948 (R. 91). It was used by General Motors as a master warehouse for the storage and distribution of automobile parts (R. 39). At the trial both parties introduced evidence as to the fair rental value of the property taken (R. 15, 41; cf. R. 25–27, 39, 44–45, 93). General Motors then sought to prove damages and expenses incurred in "demolishing" and moving personal property from the warehouse and relocating it elsewhere (R. 45–54).[1] An offer was made to prove that the company had installed $101,000.00 worth of equipment (storage bins and other facilities) in the warehouse; that it had an inventory of $250,000.00 worth of parts and machinery located in the warehouse at the time of the taking; and that the expenses and losses incurred in moving were $83,598.39 (R. 49–54). Included in the expenses and losses alleged to have been incurred were salaries and wages paid regular and special employees for time spent exclusively in moving (Offers of Proof Nos. 1, 3, 4, 6–12, 14–16, R. 50–52); separation and vacation

[1] The word "demolished" as used in the offer of proof referred to the dismantling of equipment and not its destruction. The property and inventory removed were not fixtures. As General Motor's offer of proof states, the property "demolished" (i. e., dismantled and removed) was "bins and other personal property" (R. 49).

allowance payments made to employees discharged and not rehired (Offer of Proof No. 2, R. 50); wages for janitors and watchmen during the moving period (Offer of Proof No. 5, R. 50); state and federal unemployment and old age benefit taxes on salaries and wages paid for moving purposes (Offer of Proof No. 13, R. 51); cost of supplies and materials purchased or on hand which were used in moving (Offers of Proof Nos. 17, 18, 20, R. 52); telephone and telegraph charges incidental to arranging for shipment of parts and accessories (Offer of Proof No. 19, R. 52); freight charges on shipment of inventory and equipment to other cities (Offers of Proof Nos. 22–30, R. 52–53); unamortized cost of installing a burglar alarm system (Offer of Proof No. 31, R. 53); cost of renting storage space for fixed assets during the term of the Government's taking (Offer of Proof 32, R. 53); value of bin equipment destroyed during removal (Offer of Proof No. 33, R. 53); cost of installing and moving fixed assets (Offer of Proof No. 33, R. 53–54).

The trial court excluded all evidence relating to the claim for removal expenses (R. 48), and rejected the respondent's offer of proof (R. 55). The jury's verdict as to the just compensation to be paid to General Motors for the taking was thus based solely upon the fair rental value of the warehouse during the period from June 19, 1942, to June 30, 1943 (R. 93; cf. R. 80–81). Judgment was entered accordingly (R. 102–104).

On appeal, the Circuit Court of Appeals reversed the judgment of the District Court. It held that General Motors was entitled to prove, as an element of "just compensation" under the Fifth Amendment, the actual and necessary expenses directly incurred in vacating the property condemned, and that the respondent's offer of proof was therefore erroneously excluded (R. 114–123). Judge Minton dissented (R. 123–124).

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with numerous rulings, both of this Court and the lower courts, that expenses incurred by an owner or lessee in vacating condemned property are not, in the absence of statute, to be included within "just compensation." *Joslin Co.* v. *Providence*, 262 U. S. 668, 676, cited with approval in *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 282, n. 13; *Potomac Electric Power Co.* v. *United States*, 85 F. (2d) 243, 249 (App. D. C.), certiorari denied, 299 U. S. 565; *Futrovsky* v. *United States*, 66 F. (2d) 215, 216–217 (App. D. C.); *Gershon Bros. Co.* v. *United States*, 284 Fed. 849 (C. C. A. 5). In the *Joslin* case, *supra*, at 676, this Court held: "Ordinarily, the cost of removing personal property from land taken is not a proper element of damage unless made so by express statute * * *." While the court below recognized that removal expenses need not be paid when the fee simple is condemned, it

held, nevertheless, that such expenses are compensable when less than the fee is taken. In this respect its ruling directly conflicts with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Gershon Bros. Co.* v. *United States*, 284 Fed. 849 (C. C. A. 5). In the latter case the United States had also taken storage space for a temporary period. The court held that expenses incurred in moving were not compensable, and that the lessee was entitled only to the market value of the property taken. 284 Fed. at 850.

The court below explicitly refused to follow the rule applied by the Circuit Court of Appeals for the Fifth Circuit in the *Gershon* case. It held, instead, that under the decisions of this Court in *United States* v. *Miller*, 317 U. S. 369, 373, *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 304, and *United States* v. *New River Collieries Co.*, 262 U. S. 341, 345, a condemnee is entitled "to be put in as good position pecuniarily as he would have occupied if his property had not been taken" (R. 118). We submit, however, that the standard applied by the court below departs from the established principle that consequential damages and incidental losses are not compensable, unless made so by statute. See *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281–283, and cases cited. In the *Powelson* case, *supra*, at 281–282, this Court held: "It is a well settled rule that while it is the

owner's loss, not the taker's gain, which is the measure of compensation for the property taken * * *, not all losses suffered by the owner are compensable under the Fifth Amendment. In absence of a statutory mandate * * * the sovereign must pay only for what it takes, not for opportunities which the owner may lose." And in *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 81, it was stated: "The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes."

The rule expressed in *United States* v. *Miller*, 317 U. S. 369, 373, and in the other cases relied upon by the court below, that an owner is entitled to be put in as good position pecuniarily as if his property had not been taken, does not require that he be compensated for all injuries and business losses suffered. *Mitchell* v. *United States*, 267 U. S. 341, 345; *Bothwell* v. *United States*, 254 U. S. 231; *Omnia Co.* v. *United States*, 261 U. S. 502, 508–513; *Joslin Co.* v. *Providence*, 262 U. S. 668, 676; *Olson* v. *United States*, 292 U. S. 246, 255; *Mullen Benevolent Corp.* v. *United States*, 290 U. S. 89, 94–95. "There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment." *United States ex rel. T. V. A.* v. *Powelson, supra*, at 281. Clearly, therefore, the District Court was justified in holding that

the measure of compensation to which the respondent was entitled under the Fifth Amendment was limited to the fair rental value of the warehouse during the period from June 19, 1942, to June 30, 1943.[2]

2. In allowing compensation for a consequential loss, the court below provided a remedy which

[2] While recognizing that state law is not controlling, the court below relied upon statements of dubious authority found in several state decisions which run counter to the great weight of authority. *Chicago, M. & St. P. Ry. Co.* v. *Hock*, 118 Ill. 587 (1886); *Metropolitan West Side Elevated R. R. Co.* v. *Siegel*, 161 Ill. 638, 648–649 (1886), and *James McMillin Printing Co.* v. *Pittsburgh, C. & W. R. Co.*, 216 Pa. 504 (1907), have been discredited by subsequent decisions in the same jurisdictions. See *Braun* v. *Metropolitan West Side Elevated R. R. Co.*, 166 Ill. 434, 437–439 (1897); *Iron City Auto. Co.* v. *Pittsburgh*, 253 Pa. 478, 484–486, 493–494 (1916). In *Des Moines W. W. Laundry* v. *City*, 197 Iowa 1082 (1924), the property removed was fixtures, not personalty, and reliance was placed upon the fact that under the statute there involved the owner was entitled to "damages." However, "just compensation" under the Fifth Amendment has never been construed to include "damages." *Mitchell* v. *United States*, 267 U. S. 341, 345–346; *Futrovsky* v. *United States*, 66 F. (2d) 215, 216–217 (App. D. C.).

Although many state constitutions require compensation for consequential damages resulting from public improvements, removal costs are excluded under the decisions in the great majority of the states. *Central Pac. R. R. Co.* v. *Pearson*, 35 Cal. 247, 263 (1868); *County of Los Angeles* v. *Signal R. Co.*, 86 Cal. App. 704, 710–712 (1927); *Mayor & C. C. of Balto.* v. *Gamse*, 132 Md. 290, 296–297 (1918); *In re Assessment for Widening Third St., St. Paul*, 176 Minn. 389, 392 (1929); *St. Louis* v. *St. Louis, I. M. & S. Ry.*, 266 Mo. 694, 707 (1916); *Springfield S. W. Ry. Co.* v. *Schweitzer*, 173 Mo. App. 650, 655 (1913); *Randet* v. *Railroad*, 62 N. H. 561, 564 (1883); *Matter of New York, S. W. & B. R. Co.*, 35 Hun 633 (N. Y. 1885); *Fiorini* v. *Kenosha*, 208 Wis. 496, 499 (1932).

Congress considered and deliberately rejected. When the bill which became the Second War Powers Act was debated in the House of Representatives, the following amendment was offered: "The amount paid for any property taken shall include fair compensation for losses proximately caused by the taking in addition to the fair value of the property itself." 88 Cong. Rec. 1653. After considerable discussion this amendment was rejected. 88 Cong. Rec. 1653–1656.

The court below, admitting that the question was a "difficult one" (R. 115) and that its decision was "not free from doubt," was influenced by the belief that exclusion of removal costs would be "inequitable as well as unjust" (R. 122). We submit, however, that the question of determining the extent to which consequential damages and incidental losses should be compensated has always rested within the province of the legislatures, not the courts. Cf. *Joslin Co.* v. *Providence*, 262 U. S. 668, 676; *Mitchell* v. *United States*, 267 U. S. 341, 345–346; *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281–284.

The present case itself discloses that the question is of such a nature as to warrant legislative rather than judicial solution. The items claimed by the respondent under the heading of removal costs cover a wide range. They include such disparate items as separation and vacation allowances paid to employees who were discharged and not rehired when the warehouse was closed down;

telephone and telegraph charges incidental to arranging for shipment of inventory and equipment; and rent incurred for storing fixed assets during the period of occupancy by the Government. In similar cases claims have been based upon the increased rentals and bonuses paid for new premises; the cost of photographs of the new location which were sent to the principal office of the company; the cost of changing advertising cuts; and the cost of paper drinking cups used by the movers. In a sense, all such claims are the inevitable consequences of vacating condemned premises, and hence compensable under the rule applied by the court below. Since there is no statute specifically delimiting the incidental expenses for which compensation may be had, the standard employed by the court below, *i. e.*, that the expenses be "actual," "necessary," and "directly incurred in vacating the property condemned" (R. 122–123), is necessarily vague and ambiguous. If such an indefinite criterion of compensation should be accepted, much confusion would inevitably ensue. We submit that the intrinsic character of the problem calls for legislative rather than judicial formulation of specific standards and limitations.

3. The question presented is one of great importance to the Government in its acquisition and use of property for war purposes. Temporary use of large amounts of property has been taken by the Government under the Second War Powers

Act. Many owners have settled their claims against the Government upon the assumption that the hitherto unquestioned principle denying compensation for removal expenses is still in effect. Many other owners are claiming such expenses.[3]

CONCLUSION

The court below has determined an important question of federal law in a manner in conflict with controlling decisions of this Court, as well as with rulings of other lower courts. It is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

MAY 1944.

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[3] Claims for removal expenses are being asserted in cases now pending in the Eighth, Ninth, and Tenth Circuits: *Katz Drug Co.* v. *United States*, No. 12,681 (C. C. A. 8); *United States* v. *Chuett, Peabody & Co.*, No. 10,543 (C. C. A. 9); and *United States* v. *Petty Motor Co.*, Nos. 2820–2826 (C. C. A. 10).

APPENDIX

Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, c. 199, sec. 201, 50 U. S. C. App., Supp. III, sec. 632, provides as follows:

> SEC. 201. The Act of July 2, 1917 (40 Stat. 241), entitled "An Act to authorize condemnation proceedings of lands for military purposes", as amended, is hereby amended by adding at the end thereof the following section:
>
> "SEC. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used,

and improved for the purposes of this Act, notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended."

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In the Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES OF AMERICA, PETITIONER

v.

GENERAL MOTORS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The majority and minority opinions of the circuit court of appeals (R. 90–100) are reported in 140 F. 2d 873. The district court did not write an opinion.

JURISDICTION

The judgment of the circuit court of appeals was entered on February 11, 1944 (R. 100–101). The petition for a writ of certiorari was filed on May 3, 1944, and was granted on May 29, 1944 (R. 102). The jurisdiction of this Court rests on section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in a proceeding by the United States to acquire the temporary use of a business prop-

erty, necessary expenses incurred by the lessee in vacating the premises constitute an element of "just compensation" within the Fifth Amendment.

STATUTE INVOLVED

Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, c. 199, sec. 201, 50 U. S. C. App. Supp. III, sec. 632, is set forth in the Appendix, *infra*, pp. 26–27.

STATEMENT

The United States on June 8, 1942, instituted proceedings under Title II of the Second War Powers Act to condemn, for a term ending June 30, 1943, a portion of a warehouse needed in connection with the establishment by the War Department of a Signal Corps depot in Chicago (R. 1–3, 71–72). An order granting immediate possession was entered on the same day (R. 3). General Motors Corporation, the lessee occupant of the premises, began moving out on June 19, 1942 (R. 58). At the trial before a jury, the sole issue was the amount of compensation to be paid for the term commencing June 19, 1942, and ending June 30, 1943 (R. 68, 75). The pertinent facts are as follows:

The warehouse, containing a total of 195,840 square feet of floor space, is owned by the Clearing Industrial District, Inc., and was leased to the General Motors Corporation in 1928 for a

term ending May 31, 1948 (R. 74). It was used by General Motors as a master warehouse for the storage and distribution of automobile parts (R. 32). On January 1, 1942, the United States subleased about half of the warehouse (102,167 square feet) from General Motors at an annual rental of 40 cents per square foot (R. 75). Thereafter, the United States brought this proceeding to condemn the temporary use of the remainder of the building (93,673 square feet).

At the trial both parties introduced evidence as to the fair rental value of the property taken, the testimony varying from 35 to 42 cents per square foot (R. 11, 34, cf. R. 19–21, 32, 36–37, 75). General Motors then sought to prove damages and expenses incurred in "demolishing" and moving personal property from the warehouse and relocating it elsewhere (R. 38–45).[1] An offer was made to prove that the company had installed $101,000.00 worth of equipment (storage bins and other facilities) in the warehouse; that it had an inventory of $250,000.00 worth of parts and machinery located in the warehouse at the time of the taking; and that the expenses and losses incurred in moving were $83,598.39

[1] The word "demolished" as used in the offer of proof referred to the dismantling of equipment and not its destruction. The property and inventory removed were not fixtures. As General Motors' offer of proof states, the property "demolished" (i. e., dismantled and removed) was "bins and other personal property" (R. 41).

(R. 41–45). Included in the expenses and losses alleged to have been incurred were salaries and wages paid regular and special employees for time spent exclusively in moving, i. e., in preparing the property for moving, keeping track of it, moving it and receiving, unloading, checking and putting it away at the places to which it was shipped (Offers of Proof Nos. 1, 3, 4, 6–12, 14–16, R. 41–43); separation and vacation allowance payments made to employees discharged and not rehired (Offer of Proof No. 2, R. 42); wages for janitors and watchmen during the moving period (Offer of Proof No. 5, R. 42); state and federal unemployment and old age benefit taxes on salaries and wages paid for moving purposes, as well as lay-off benefits set aside in accordance with a plan in effect by General Motors (Offer of Proof No. 13; R. 43); cost of supplies and materials purchased or on hand which were used in moving (Offers of Proof Nos. 17, 18, 20, R. 43–44); telephone and telegraph charges incidental to arranging for shipment of parts and accessories (Offer of Proof No. 19, R. 44); freight charges on shipment of inventory and equipment to other cities (Offers of Proof Nos. 22–30, R. 44); unamortized cost of installing a burglar alarm system (Offer of Proof No. 31, R. 44–45); cost of renting storage space for fixed assets during the term of the Government's taking (Offer of Proof No. 32, R. 45); value of bin equipment destroyed during removal (Offer of Proof No. 33,

R. 45); cost of installing and moving fixed assets (Offer of Proof No. 33, R. 45).

The trial court excluded all evidence relating to the claim for removal expenses (R. 40), and rejected the respondent's offer of proof (R. 46). The jury's verdict of $38,597.86 or approximately 40 cents per square foot per year was thus based solely upon the fair rental value of the warehouse during the period from June 19, 1942, to June 30, 1943 (R. 75; cf. R. 68–69). Judgment was entered accordingly (R. 82–83).

On appeal, the circuit court of appeals reversed the judgment of the district court (R. 100–101). It held that General Motors was entitled to prove, as an element of "just compensation" under the Fifth Amendment, the actual and necessary expenses directly incurred in vacating the property condemned, and that the respondent's offer of proof was therefore erroneously excluded (R. 90–99). Judge Minton dissented (R. 99–100).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that in a proceeding by the United States to acquire the temporary use of a business property, necessary expenses incurred by the lessee in vacating the premises constitute an element of "just compensation" within the Fifth Amendment.

2. In holding that the district court erroneously excluded respondent's offer to prove expenses

allegedly incurred in vacating the property condemned.

3. In reversing the judgment of the district court.

SUMMARY OF ARGUMENT

I

Under the Fifth Amendment the owner is entitled to just compensation for the property which the Government "takes". *Monongahela Navigat'n Co.* v. *United States*, 148 U. S. 312, 326; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 81; *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281–282.

Not all losses suffered by an owner whose property is taken for public use are compensable. *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281–283; *Mitchell* v. *United States*, 267 U. S. 341, 345; *Joslin Co.* v. *Providence*, 262 U. S. 668, 676; *Omnia Co.* v. *United States*, 261 U. S. 502, 510–511; *Bothwell* v. *United States*, 254 U. S. 231.

Among the losses most frequently held to be non-compensable is the expense incurred by the condemnee in vacating the premises taken. *Joslin Co.* v. *Providence*, 262 U. S. 668, 676; *Potomac Electric Power Co.* v. *United States*, 85 F. 2d 243, 249 (App. D. C.), certiorari denied, 299 U. S. 565; *Gershon Bros. Co.* v. *United States*, 284 Fed. 849 (C. C. A. 5); *Pacific Live Stock Co.* v. *Warm Springs Irr. Dist.*, 270 Fed. 555, 559 (C. C. A. 9); *Wm. Wrigley, Jr., Co.* v. *United States*, 75 C. Cls.

569, 583–585; *United States* v. *0.64 Acres of Land in Los Angeles County*, 54 F. Supp. 562 (S. D. Cal.); *United States* v. *Building known as 651 Brannan Street*, 55 F. Supp. 667 (N. D. Cal.).

II

Although removal costs may be made compensable by statute, the settled policy of Congress has been to limit compensation to interests in the land taken. *Mitchell* v. *United States*, 267 U. S. 341, 346. Congress expressly reaffirmed this policy when it enacted the Second War Powers Act under which the present property was taken. Title II, Second War Powers Act (Appendix, pp. 26–27 *infra*); see 88 Cong. Rec., pp. 1649, 1653, 1654–1656.

If consequential damages are to be made compensable the intrinsic character of the problem calls for legislative formulation of specific standards and limitations, rather than an overturning by the courts of the basic principle that under the Constitution the Government pays only for the property which it takes.

ARGUMENT

I

JUST COMPENSATION FOR THE TAKING OF PROPERTY DOES NOT INCLUDE EXPENSES INCURRED IN VACATING THE PREMISES

The property condemned in this proceeding was the temporary use of part of a warehouse. In

fixing the compensation to be paid for the use of the space taken the district court excluded evidence of the expenses alleged to have been incurred by respondent because it had to move. Compensation was limited to the fair rental value of the space taken for the period for which it was sought. In other words, respondent's recovery was limited to the value of the property *taken*. No recovery was allowed for losses occurring as a result of the taking.

The Fifth Amendment requires the payment of just compensation for private property "taken" for public use. As Mr. Justice Brewer pointed out in *Monongahela Navigat'n Co.* v. *United States*, 148 U. S. 312, 326: "* * * just compensation * * * is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. 'No person shall be held to answer for a capital, or otherwise infamous crime,' etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the 'just compensation' is to be a full equivalent for the property taken." "The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes." *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 81; see also *United States* v. *Miller*, 317 U. S. 369, 374; *Olson* v. *United States*, 292 U. S. 246, 255.

Consequential losses or injuries resulting from the taking are not compensable. *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 281–282; *Mitchell* v. *United States,* 267 U. S. 341, 345; *Joslin Co.* v. *Providence,* 262 U. S. 668, 676; *Omnia Co.* v. *United States,* 261 U. S. 502, 510–511. "* * * not all losses suffered by the owner are compensable under the Fifth Amendment. In absence of a statutory mandate * * * the sovereign must pay only for what it takes, not for opportunities which the owner may lose." *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 281–282. Thus, in the *Mitchell* case, *supra,* the owner was denied compensation for the destruction of his business which resulted from the taking of his land for a public project even though the business could not be reestablished elsewhere. In *Bothwell* v. *United States,* 254 U. S. 231, this Court held that there was no obligation on the part of the Government to pay the loss due to a forced sale of cattle and destruction of business resulting from the taking. Similarly, while the Fifth Amendment allows the owner the fair market value of his property, "it does not guarantee him a return of his investment." *United States ex rel. T. V. A.* v. *Powelson, supra,* at p. 285; *Olson* v. *United States,* 292 U. S. 246, 255. Likewise, the destruction of valuable contract rights involving property taken are not compensable although resulting in a pecuniary loss to the owner. "Frustration and appropriation are es-

sentially different things." *Omnia Co.* v. *United States,* 261 U. S. 502, 508–513. See also *Mullen Benevolent Corp.* v. *United States,* 290 U. S. 89, 94–95.

Among the losses most frequently held to be non-compensable is the expense incurred by the owner in moving personal property or a business from the premises condemned. *Joslin Co. v. Providence,* 262 U. S. 668, 676; *Potomac Electric Power Co.* v. *United States,* 85 F. 2d 243, 249 (App. D. C.), certiorari denied, 299 U. S. 565; *Futrovsky* v. *United States,* 66 F. 2d 215, 216–217 (App. D. C.); *Pacific Live Stock Co.* v. *Warm Springs Irr. Dist.,* 270 Fed. 555, 559 (C. C. A. 9); *United States* v. *0.64 Acres of Land in Los Angeles County,* 54 F. Supp. 562 (S. D. Cal.); *United States* v. *Building known as 651 Brannan Street,* 55 F. Supp. 667 (N. D. Cal.); cf. *Mitchell* v. *United States,* 267 U. S. 341, 345; *Bothwell* v. *United States,* 254 U. S. 231.

Likewise, attempts by a lessee to recover removal expenses in condemnation proceedings have been rejected repeatedly by the courts. *Gershon Bros. Co.* v. *United States,* 284 Fed. 849 (C. C. A. 5); *Wm. Wrigley, Jr., Co.* v. *United States,* 75 C. Cls. 569, 583–585; *Howard Co.* v. *United States,* 81 C. Cls. 646, 654; *Thermal Syndicate, Ltd.* v. *United States,* 81 C. Cls. 446, 454; *Chrystal* v. *United States,* 81 C. Cls. 461, 468; *United States* v. *Certain Parcels of Land, Etc.,* 54 F. Supp. 561 (S. D.

Cal.); *United States* v. *Improved Premises, Etc.*, 54 F. Supp. 469–472 (S. D. N. Y.); *United States* v. *Entire Fifth Floor in Butterick Building*, 54 F. Supp. 258, 261 (S. D. N. Y.); *United States* v. *Meyers*, 190 Fed. 688 (Conn.).[2]

Neither General Motors' business nor its equipment and inventory have been taken. The right to use the warehouse only has been taken. The

[2] While recognizing that state law is not controlling (see *United States* v. *Miller*, 317 U. S. 369, 379–380), the court below relied upon statements of dubious authority found in several state decisions which run counter to the great weight of authority. *Chicago, M. & St. P. Ry. Co.* v. *Hock*, 118 Ill. 587 (1886); *Metropolitan West Side Elevated R. R. Co.* v. *Siegel*, 161 Ill. 638, 648–649 (1896), and *James McMillin Printing Co.* v. *Pittsburgh, C. & W. R. Co.*, 216 Pa. 504 (1907), have been discredited by subsequent decisions in the same jurisdictions. See *Braun* v. *Metropolitan West Side Elevated R. R. Co.*, 166 Ill. 434, 437–439 (1897); *Iron City Auto. Co.* v. *Pittsburgh*, 253 Pa. 478, 484–486, 493–494 (1916); cf. also *Becker* v. *Philadelphia & Reading R. R.*, 177 Pa. 252, 258–261 (1896).

Although many state constitutions require compensation for consequential damages resulting from public improvements, removal costs are excluded under the decisions in the great majority of the states. *Central Pac. R. R. Co.* v. *Pearson*, 35 Cal. 247, 263 (1868); *County of Los Angeles* v. *Signal R. Co.*, 86 Cal. App. 704, 710–712 (1927); *Mayor & C. C. of Balto.* v. *Gamse*, 132 Md. 290, 296–297 (1918); *New York, Etc. Railroad* v. *Blacker*, 178 Mass. 386, 391–393 (1901); *In re Assessment for Widening Third St., St. Paul*, 176 Minn. 389, 392 (1929); *St. Louis* v. *St. Louis, I. M. & S. Ry.*, 266 Mo. 694, 707 (1916); *Springfield S. W. Ry. Co.* v. *Schweitzer*, 173 Mo. App. 650, 655 (1913); *Ranlet* v. *Railroad*, 62 N. H. 561, 564 (1883); *Matter of New York, W. S. & B. R. Co.*, 35 Hun 633 (N. Y. 1885); *Fiorini* v. *Kenosha*, 208 Wis. 496, 499 (1932).

fact that personal property must be moved is incidental to the taking of the warehouse in which it was placed. It is not a taking or damaging of such property. *Wm. Wrigley, Jr., Co.* v. *United States*, 75 C. Cls. 569, 583–584. Cf. *Mitchell* v. *United States*, 267 U. S. 341, 345; *Bothwell* v. *United States*, 254 U. S. 231; *Futrovsky* v. *United States*, 66 F. 2d 215, 216–217 (App. D. C.). "As the title to all property is held subject to the implied condition that it must be surrendered whenever the public interest requires it, the inconvenience and expense incident to surrender of possession are not elements to be considered in determining the damages to which the owner is entitled." *Ranlet* v. *Railroad*, 62 N. H. 561, 564 (1883). "* * * for consequential loss or injury resulting from lawful governmental action, the law affords no remedy." *Omnia Co.* v. *United States*, 261 U. S. 502, 510–511.

As Judge Minton pointed out in his dissent (R. 99–100), moving expenses are none the less consequential when the Government condemns a temporary interest than when it condemns the fee. In *Gershon Bros. Co.* v. *United States*, 284 Fed. 849 (C. C. A. 5) the circumstances were identical with those in the present case. The United States had taken storage space for a temporary period during World War I. The Circuit Court of Appeals for the Fifth Circuit, in holding that expenses incurred in moving were not com-

pensable and that the lessee was entitled only to the market value of the property taken, said (284 Fed. at 850):

> The plaintiff asserted the right to recover more than the equivalent for the property taken, amounts in addition to the market value of the use of the space for the time the defendant had it. The "just compensation" to which the plaintiff was entitled is measured by the market value of its property taken. It was not entitled to more than that, because its expenses were increased in consequence of moving its business to another place. * * * The law charged the plaintiff with notice that it was subject to be deprived of the use of the leased premises by the exercise of the power of eminent domain. Inconvenience and expense incident to vacating premises upon the expiration of the right to retain them are not proper subjects of consideration, in determining the just compensation to be paid by the party acquiring the right to possess and use them.

Recovery of removal costs was also denied by the Court of Claims in cases where the temporary use of property was taken during the first World War. E. g., *Wm. Wrigley, Jr., Co.* v. *United States*, 75 C. Cls. 569, 583–585; *Howard Co.* v. *United States*, 81 C. Cls. 646, 654; *Thermal Syndicate, Ltd.* v. *United States*, 81 C. Cls. 446, 454; *Chrystal* v. *United States*, 81 C. Cls. 461, 468.

They have also been denied by several district courts in proceedings to condemn temporary interests during the present war. E. g., *United States* v. *0.64 Acres of Land in Los Angeles County*, 54 F. Supp. 562 (S. D. Cal.); *United States* v. *Improved Premises, Etc.*, 54 F. Supp. 469, 472 (S. D. N. Y.); *United States* v. *Entire Fifth Floor in Butterick Building*, 54 F. Supp. 258, 261 (S. D. N. Y.); *United States* v. *Building known as 651 Brannan Street*, 55 F. Supp. 667 (N. D. Cal.). In the *0.64 Acres* and the *Brannan Street* cases it was the owner who was compelled to move out temporarily; the decision of the court below was cited but not followed because it was felt to be neither sound nor in accordance with well established principles of law.

The distinction made below between fee takings and the taking of a temporary interest is that what was taken here was not merely the property, but the right to use occupied property. This overlooks the fact that in all cases denying recovery for moving costs where the fee was taken the property was also occupied. Otherwise there would have been no occasion for claiming such expenses. Furthermore, the attempted distinction overlooks the principle that the compensation which the Government must pay for property which it condemns is the fair cash market value as between a willing buyer and a willing seller. *United States* v. *Miller*, 317 U. S. 369, 374. It is

true that the warehouse in question may have had special value to General Motors because it was then in possession. But special value to a particular user is not the test. *United States* v. *Honolulu Plantation Co.*, 122 Fed. 581, 584–585 (C. C. A. 9); *In re Furman Street*, 17 Wend. 649, 670–671 (N. Y. 1836); *United States* v. *Miller*, 317 U. S. 369, 375. In the *Honolulu Plantation* case the court said (p. 584):

> Compensation to be made for property taken by the exercise of the power of eminent domain is not its value to any particular company or individual, whether plaintiff, defendant, or anybody else, but the market value of such property at the time of the exercise of the power.
>
> * * * * *
>
> That the compensation to be made for land taken by the exercise of the power of eminent domain must be measured, not by its value to any particular person, but by the market value of the land at the time of the taking, is established by many authorities. * * *.

The fact that a particular user of property "may not want to part with his land because of its special adaptability to his own use * * * must be disregarded by the fact finding body in arriving at 'fair' market value." *United States* v. *Miller*, 317 U. S. 369, 375.

The court below explicitly refused to follow the rule applied by the Circuit Court of Appeals for

the Fifth Circuit in the *Gershon case*. It held, instead, that under the decisions of this Court in *United States* v. *Miller*, 317 U. S. 369, 373, *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 304, and *United States* v. *New River Collieries Co.*, 262 U. S. 341, 345, a condemnee is entitled "to be put in as good position pecuniarily as he would have occupied if his property had not been taken" (R. 94). We submit, however, that the standard applied by the court below departs from the established principle that consequential damages and incidental losses are not compensable, unless made so by statute (*supra* pp. 9–11). The rule expressed in *United States* v. *Miller*, 317 U. S. 369, 373, and in the other cases relied upon by the court below, that an owner is entitled to be put in as good position pecuniarily as if his property had not been taken, does not require that he be compensated for all injuries and business losses suffered. *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281–283; *Olson* v. *United States*, 292 U. S. 246, 255; *Mullen Benevolent Corp.* v. *United States*, 290 U. S. 89, 94–95; *Mitchell* v. *United States*, 267 U. S. 341, 345; *Joslin Co.* v. *Providence*, 262 U. S. 668, 676; *Omnia Co.* v. *United States*, 261 U. S. 502, 508–513; *Bothwell* v. *United States*, 254 U. S. 231.

In *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, the compensation for the property was not ascertained and paid until some time after possession was taken. The only question was

whether the owner was entitled to interest on the award from the date of possession until payment. Interest was allowed as a means of giving the owner the value of the property at the time of the taking "paid contemporaneously with the taking." 261 U. S. at 306. It was in this connection that it was said that the owner was entitled to be put in as good a position pecuniarily as if his property had not been taken. 261 U. S. at 304. *United States* v. *New River Collieries*, 262 U. S. 341, clearly marks no departure from the accepted rule that just compensation is measured by the market value of the property taken. This Court there stated: "The owner was entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarly as it would have occupied if its property had not been taken. * * * Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation. * * * More would be unjust to the United States and less would deny the owner what he is entitled to." 262 U. S. at 343–344. And it will be recalled that the owner in the *Miller* case, *supra*, was not left in as good a position pecuniarily as if his property had not been taken, since he was not permitted to recover the increment in value caused by the government project, an increment enjoyed by his neighbors whose lands were not taken.

This Court has repeatedly held that an owner

is put in as good position pecuniarily as he is entitled to when he is allowed the fair market value of the property taken paid contemporaneously with the taking. See *Olson* v. *United States*, 292 U. S. 246, 255; *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343–344; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 81. "There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment." *United States ex rel. T. V. A.* v. *Powelson, supra*, at 281.

II

COMPENSATION FOR CONSEQUENTIAL LOSSES IS A MATTER FOR LEGISLATIVE RATHER THAN JUDICIAL ACTION

Although removal costs may be made compensable by express statute (*Joslin* v. *Providence*, 262 U. S. 668, 676), "the settled policy of Congress, in authorizing the taking of land and appurtenances, has been to limit the right to compensation to interests in the land taken." *Mitchell* v. *United States*, 267 U. S. 341, 346. This is all that the Constitution requires.

That Congress did not intend, when it passed the Second War Powers Act under which the present proceeding was brought, to broaden the compensation guaranteed by the Fifth Amendment is apparent from the legislative history of that Act. During the debates on the bill, the

following amendments were offered and rejected (88 Cong. Rec., pt. 2, pp. 1653, 1654, 1656 (1942)):

> The amount paid for any property taken shall include fair compensation for losses proximately caused by the taking in addition to the fair value of the property itself.

Substitute amendment:

> The amount paid for any property so taken shall include fair compensation for losses proximately caused by the taking in addition to the amount which would otherwise have been payable.

Congress considered and debated at some length whether losses in addition to the value of the property taken should be compensated for. These amendments were rejected. The debates show that Congress did not deem it wise in a time of great national peril to pay more for property than that required by the Constitution (see 88 Cong. Rec., pt. 2, pp. 1649, 1655–1656 (1942)). Among other things it was pointed out that persons other than those whose property was being taken for public use were suffering losses due to war exigencies and that it was impossible to make everyone pecuniarily "whole" (see 88 Cong. Rec., pt. 2, pp. 1649–1650).

If the just compensation guaranteed by the Fifth Amendment is to be broadened to include

certain consequential injuries, the matter is one of policy for Congress which should at least lay down some basic standard defining the extent of such recovery. The standard of compensation adopted by the court below opens the door not only to all manner of claims in the way of expenses incurred in vacating property condemned, but also to all other consequential losses such as injury to or destruction of business, losses on investments in property, no matter how improvident, and the like.

The present case discloses that the allowance of the costs incurred in vacating property condemned is of such nature as to warrant legislative relief, if any, rather than judicial. The items claimed by the respondent under the heading of removal costs cover a wide range. They include such disparate items as separation and vacation allowances paid to employees who were discharged and not rehired when the warehouse was closed down; telephone and telegraph charges incidental to arranging for shipment of inventory and equipment; and rent incurred for storing fixed assets during the period of occupancy by the Government. In similar cases claims have been based upon the increased rentals and bonuses paid for new premises; the cost of photographs of the new location which were sent to the principal office of the company; the cost of changing

advertising cuts; and the cost of paper drinking cups used by the movers. In a sense, all such costs are the inevitable consequences of vacating condemned premises, and hence compensable under the rule applied by the court below.

Even a cursory examination of some of the items indicates the innumerable collateral issues which must be inquired into and the speculation attending the effort to determine which expenses can properly be attributed solely to the condemnation and which ones were necessary. For example, how much of the cost of packing, including labor and materials, and how much of the freight charges would have been incurred in the regular course of distributing the parts stored in the Chicago warehouse? Was it necessary to ship the stock to six or seven different places—including points as far away as Kansas City and Minneapolis? Although for the purpose of future distributions it may have been more convenient for General Motors to ship its inventory to certain places, could it have been stored at less expense, albeit at less convenience, elsewhere? Respondent offered to prove that there was no available space in Chicago to store the equipment and stock (R. 45). Must the United States now investigate and attempt to prove that there was other available space suitable to General Motors' needs? This would seem to inject still another issue into

the case, namely, the suitability of other space for General Motors' purposes. The mere fact that it might not be possible to point immediately to another vacant warehouse obviously suitable would not foreclose the possibility of obtaining space. For example, in another case similar to this one which is now pending in the Circuit Court of Appeals of the Eighth Circuit[3] one of the items claimed as a necessary expense of moving was a bonus which it was contended had to be paid in order to sublease another warehouse. It is highly conjectural whether General Motors might not have obtained other space by the same means and whether its total moving expenses even with the bonus included might have been much less. The variations are unlimited, but unless the mere fact that the condemnee has incurred the expense and asserts it was necessary and the best he could do is sufficient to establish a right to have those expenses considered, inquiry into what he might have done would be necessary. The payment of vacation and separation allowances to employees discharged and not rehired when the warehouse was closed down—whether such allowances were already due the employees as part of their wages or were paid as a bonus by a beneficent employer—introduces a new element heretofore unknown in

[3] *Katz Drug Co.* v. *United States*, No. 12,681.

ascertaining just compensation for real property taken for public use.[4]

Moreover, although it may be conceded that a jury can reasonably be asked to determine what expenses are "actual," "necessary," and "directly incurred in vacating the property condemned" (R. 98–99), the rule adopted by the court below lacks that clarity of direction which is necessary if verdicts in condemnation cases are to be anything more than a financial expression of a jury's sympathies. The court below held that removal expenses may be considered "as an element of 'just compensation' guaranteed by the Fifth Amendment" (R. 91). Under this rule, what weight is to be given by the jury to them once their amount is ascertained? Are they to be included in the verdict at their dollar amount in addition to the sum fixed as the fair market value of the property taken? This would seem to be the

[4] In discussing some of the items claimed by respondent, it is not intended to concede that any of the others might properly be allowed under any circumstances or that any of them constitute "necessary" expenses "directly incurred in vacating the property condemned." For example, one of the items is rent incurred for storing equipment during the term condemned (R. 45). If General Motors had moved to another warehouse and continued its business, obviously it could not recover the rent paid for the new space. The fact that it has closed down its warehouse and stored its equipment temporarily rather than disposing of it, and has thereby sustained purely a business loss, in no way bears upon the value of what was taken.

only way in which a jury could properly "take into consideration" a fixed amount which it is instructed to regard as an element of just compensation.[5] However, the opinion does not clearly indicate that the court regarded the jury as bound to include the full amount of the removal expenses, and the court expressly rejected the view that removal expenses are recoverable "as such" (R. 91). Under the alternative theory, which seems to be that adopted by the court, the jury must give some weight to the removal expenses when ascertained, without instruction as to how much. The acceptance of such an indefinite criterion of just compensation must necessarily result in confusion.

As this Court pointed out in *United States* v. *Miller*, 317 U. S. 369, 374, the courts, in an effort to find some practical standard to measure compensation, "early adopted, and have retained, the concept of market value." "The concept of market value, judicially applied, attaches to property, never to the person of the owner. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 326, 13 S. Ct. 622, 37 L. Ed. 463. If personal damage or detriment were intruded, the test of fair market value would become completely unstandardized and illusory." *United States* v.

[5] Such an interpretation would in this case have the effect of requiring the Government to pay General Motors approximately $1.29 per square foot for space substantially identical with space which six months earlier General Motors had been willing to lease to the Government at $0.40 per square foot.

Building known as 651 Brannan Street, 55 F. Supp. 667, 670 (N. D. Cal.).

We submit that if consequential damages are to be made compensable the intrinsic character of the problem calls for a legislative formulation of standards and limitations, rather than an overturning by the courts of the basic principle that under the Constitution the Government pays only for the property which it takes.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the district court correctly ruled that the measure of compensation to which the respondent was entitled under the Fifth Amendment was limited to the fair rental value of the warehouse during the period from June 19, 1942, to June 30, 1943, and that the judgment of the circuit court of appeals providing for the recovery of removal expenses should be reversed.

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SEPTEMBER 1944.

APPENDIX

Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, c. 199, sec. 201, 50 U. S. C. App., Supp. III, sec. 632, provides as follows:

> SEC. 201. The Act of July 2, 1917 (40 Stat. 241), entitled "An Act to authorize condemnation proceedings of lands for military purposes," as amended, is hereby amended by adding at the end thereof the following section:
>
> "SEC. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be

occupied, used, and improved for the purposes of this Act, notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 76.

UNITED STATES OF AMERICA,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

BRIEF FOR RESPONDENT.

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THE COURT PRESS, N. Y. C.

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BRIEF FOR RESPONDENT.

The substantially accurate statement in the Government's brief (pp. 1 to 5) respecting the proceedings in this case in the District Court and the Circuit Court of Appeals requires but one further preliminary statement by respondent. In the ensuing references, *en bloc*, to the items of cost and expense offered to be proved at the trial as having been incurred in taking down and removing the storage bins and other equipment and for assembling, packing and removing respondent's inventory of parts, machinery and other belongings, under the compulsion of vacating the property at once for the Government's temporary use for only one year of the unexpired six year term of respondent's lease, it is not intended to claim that each and every item offered in evidence is free from all objection to admissibility in evidence. If any or some, though not all, of the items of such cost and expense would be received in evidence, the Circuit Court of Appeals decision, that it was error for the District Court to limit the compensation allowed to

respondent by the jury's verdict to the fair value of the vacant space and to exclude any allowance whatever for the actual cost and expense directly incurred by it in vacating the condemned property, still presents the basic question whether such cost and expense are to be considered as a factor in the determination of the just compensation to which respondent is entitled.

Summary of Argument.

§ I.

On a fair and sound application of the principle that the condemnee is entitled to be put in as good position pecuniarily as he would have been if the condemnation had not taken place, a lessee of property occupied and used under a lease for a term of years, upon Government condemnation for its own temporary use for a period less than the unexpired lease term, is and should be accorded the right and opportunity to prove, as a factor to be considered in the determination of the just compensation to which the condemnee is entitled, the cost and expense of demolition and removal of equipment, facilities and belongings from the property at the Government's direction for its immediate use. Such cost and expense represent loss and damage produced directly by the fact that the Government condemned the temporary use of the property, particularly since respondent will be compelled, upon termination of the Government's temporary use, to reoccupy the property under the lease and eventually to move out again upon expiration thereof.

Despite the Government's effort, in its brief, to create an impression to the contrary, particularly in its over-reliance on this Court's decision in *Joslin Co. v. Providence*, 262 U. S. 668, the circumstances of this case present a question which is one of first impression in this Court. As far as the precise situation in this case is concerned, the conflict in lower court decisions is between

the Circuit Court of Appeals in this case and the courts in *Gershon Bros. Co. v. United States*, 284 Fed. 849 and *United States v. Building, etc.*, 55 F. Supp. 667. The result reached by the Circuit Court of Appeals in this case attains substantial justice in accordance with the principles underlying the determination of just compensation in condemnation cases, as against the contrary result reached in the other two cases, the latter of which dismissed the question with an unwarranted reliance on this Court's decision in *Joslin Co. v. Providence, supra.*

Other lower court decisions cited by the Government against respondent's right to be compensated for the dismantling and removal cost and expense in question, wholly in reliance on a naked generalization by the court that removal expense is not compensable, are for the most part rooted in an unwarranted acceptance of the decision in *Joslin Co. v. Providence, supra*, as authority for the conclusion; moreover, they involve dissimilar situations. (*United States v. Improved Premises, etc.*, 54 F. Supp. 469; *United States v. Entire Fifth Floor in Butterick Bldg.*, 54 F. Supp. 258; *United States v. 0.64 Acres of Land in Los Angeles County*, 54 F. Supp. 562; *Futorsky, et al. v. United States*, 66 Fed. [2d] 215; *Potomac Electric Power Co. v. United States*, 85 Fed. [2d] 243.)

II.

The items offered in evidence by respondent are directed solely to proof of the loss and damage suffered by respondent by reason of the Government's condemnation of temporary use of the property, to the extent only of the cost and expense incurred by it in order to remove from the property and yield the vacant space to the Government immediately for its temporary use. Respondent does not seek, and the recovery of such cost and expense will not give it, any compensation whatever for loss or

frustration of the business if conducted on the condemned property, for loss of opportunities or profits, or for the value of the bins, equipment or inventory in place.

For that reason, allowance of compensation for the cost and expense of removal in the circumstances of this case is not at all precluded by the array of authorities, as formidable and imposing as it may appear to be, in support of the proposition urged by the Government (Brief, pp. 9, 16) that consequential or frustration damages are not compensable in condemnation cases. Since consequential damages, in the sense in which they are prohibited in condemnation cases, are not involved here, the absence from the statute (Second War Powers Act) of any express provisions regarding such damages is not a valid objection to respondent's right to compensation for cost and expense of removal; where, as here, the allowance of compensation is not dependent on express sanction in the statute but is governed by "just compensation" under the Fifth Amendment, the ascertainment of such compensation is a judicial function. *Seaboard Air Line Ry. v. United States*, 261 U. S. 299.

III.

The true significance of the Government's objections lies in that which it has failed pointedly to say. The real reason for its objection to respondent's right to compensation for the loss represented by the cost and expense of dismantling and moving out its equipment is that, notwithstanding the Government's condemnation of the property for its own temporary use was directly and exclusively responsible for such loss, it considers itself as having received no specific or tangible benefit from the removal of something it did not turn to its own use. To that reason is traceable the motive for the irrelevant statement that neither respondent's "business nor its equipment and inventory have been taken." The right to use the warehouse

only has been taken" (Brief, p. 11). If disregards the settled principle that it is the condemnee's loss which determines just compensation (*United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 76; *United States* v. *Miller*, 317 U. S. 369, 375), and it erroneously presupposes that just compensation for a loss not to be increased by reason of any specific gain to the taker will nevertheless be decreased to the extent of an absence of such gain to the taker.

Argument.

I.

Cost and expense of demolition and removal compelled by condemnation for temporary use are entitled to be considered in determination of just compensation.

Stripped to its essentials, the Government's position appears to be that, since it was interested only in acquiring the bare space it desired immediately for its own temporary use as a Signal Corps depot, compensation for the property taken by it should be limited to the fair value of the unoccupied space it ultimately received, to the exclusion of that element of value for what it took which is measurable by the loss involved in the cost and expense to respondent of removing its equipment, facilities and inventory, and delivering immediately to the Government the bare space it demanded. The Circuit Court of Appeals summarized the Government's case similarly (R. 91, 92).

The net result of the Government's concentration of attention on the unoccupied space it desired for its own use is to ignore completely the fact that its ultimate acquisition of the bare space for a year's use required first that respondent be dislodged from its own use and possession of property under a lease with an unexpired term of approximately five years after termination of

the Government's temporary use, at the cost and expense to respondent of temporarily vacating the premises for one year in order to make the unoccupied space available for the Government's use during that period, only to be compelled to incur the cost and expense, not only of re-occupying the property for the balance of the lease term after the condemnation period, but also of removal, again at the expiration of the lease term.

The Government's indifference to the loss inflicted on respondent by the condemnation in the circumstances of this case can be explained only as emanating from an undiscriminating intentness on the desirability of confining payment to the value of the bare space, without distinction between one case and another. Respondent submits that the result, as far as the situation in this case is concerned, is that the Government is in the position of arguing for an untenable application of the general principle, recently re-stated by this Court (*United States v. Miller*, 317 U. S. 369, 373, and *United States ex rel. T. V. A. v. Powelson*, 319 U. S. 266) as the controlling guide in approaching the problem of just compensation, that the just compensation provided by the Fifth Amendment to be paid for the taking of private property for public use "means the full and perfect equivalent in money of the property taken" and that the "owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken". It is difficult to recognize in the Government's position the equitable principles on which the doctrine of just compensation supposedly rests. *Seaboard Air Line Ry. Co. v. United States*, 261 U. S. 299, 304; *United States v. New River Collieries Co.*, 262 U. S. 341, 343; *United States ex rel. T. V. A. v. Powelson, supra.*

If, in its desire to acquire unoccupied property for its own immediate and temporary use, the Government had condemned unoccupied space, respondent could not seriously dispute the proposition that the fair-market value of the unoccupied space would constitute just compensa-

tion for the loss of its right to such space as lessee. But the fact is that, when the property was condemned, respondent was, as it had been, occupying and using it. Its use of the space was physically embodied in the bins, the equipment and other facilities erected and, together with the inventory, employed in the business it conducted there. Its use of the equipment and facilities constituted an integral part of the property which it, as lessee of the premises, owned in the space. As the Circuit Court of Appeals said (R. 92): "* * * it was defendant's use which was condemned and not merely a one-year part of its term lease. * * * It may also be noted that defendant had something more than the right to use, as would be the case where the property of a lessee was unoccupied. Here, the right to use had been exercised and such right was merged in the actual and physical possession of the property. * * *"

Since the property was occupied and used by respondent the Government could not take the space for its own use without taking from respondent, over and above its right to the space as lessee, its possession and use, as physically exemplified by the bins and equipment. The expropriation of respondent's use and occupancy, under the compulsion of leaving the premises unoccupied, necessarily involved the dismantling and removal or destruction of the physical embodiment of such use and possession. Respondent's loss of use and occupancy to the Government's condemnation of temporary use of the property was accompanied by a call for speed; the Government accelerated respondent's activities in clearing the premises of all its equipment and property, to strip them down to vacant space, by referring to the necessity of using troops if the task was not accomplished within a given time (R. 54). Since the Government insisted upon immediate removal in any event, it is clear that the cost and expense of removal could not be avoided by storing the equipment and facilities in the property during the Government's use and occupancy of it, as in *United States*

v. *Entire Fifth Floor in Butterick Bldg.*, 54 F. Supp. 258, 261.[1] The alternative was to leave everything there and cast on the Government the burden of moving anything that encumbered the space it required for its own use out to the street. Had the Government cleared the requisitioned space it would have done so at its own cost, expense and risk; there would then have arisen no claim that respondent should be forced to reimburse the Government. Yet in substance its position now comes to the same thing. The expense of demolition and removal, for the accommodation of the Government, in justice must be borne by the Government and not by respondent. Else respondent is not made whole and the Government is unjustly enriched.

The process of yielding the possession and use of the space entailed the cost and expense of reducing the premises to the bare space required by the Government for conversion to its own use. Such cost and expense are plainly identified with the possession and use of which respondent was deprived by the Government's taking. The surrender of possession and use directly compelled by the condemnation of the temporary use of the space for the Government's purposes is directly, specifically and physically translatable into the cost and expense involved in turning over to the Government the space it required. Besides being capable of precise ascertainment, such damages are so integrally and proximately related to the use and possession of the property taken from respondent as clearly to constitute a loss sustained by it in the Government's expropriation of its use and possession of the property.

From the standpoint of the broad principles on which just compensation is predicated, all the considerations

[1] But the fact that the tenant's partitions and improvements remained in storage in the premises occupied by the Government did not deter the District Court from saying, as though it were deciding, that the tenant would receive no award for expenses in removing plant and equipment.

underlying the concept of the substantial justice which is concerned with making the condemnee pecuniarily whole are, in the circumstances of this case, in favor of respondent's right to compensation for the cost and expense of removal from the property taken by the Government for its own use. It is not a denial of the uncontested right on the part of the Government to condemn the use of the property, but rather an assertion of respondent's right to compensation for the value of what the Government did take, to say that respondent's right to the uninterrupted continuation of its use and possession of the property for the duration of its lease is an element of value, in addition to the market value of the bare space, which is measurable by the cost and expense incurred in the removal of the equipment and inventory physically embodying the use and occupancy extinguished by the condemnation of the property for the Government's own use. Payment of the market value of the bare space, comprising only part of the whole of what it took, does not compensate respondent for that element of value represented by the use and occupancy which it lost. As was said in *McMillin Printing Co.* v. *Pittsburg C. & W. R. Co.*, 216 Pa. 504, such loss may be considered for the purpose of determining market value.

If respondent's loss in respect of the use and occupancy taken from it is not, by itself, measurable by the same standard of fair market value as was used in determining the value of the bare space, it has a value readily ascertainable by reference to something closer to actuality than the extrinsic factors, such as the guess of experts, considered in the application of market value as a practical standard, namely, the specific and definite items of cost and expense actually and directly incurred in dismantling respondent's equipment and moving it, together with the inventory and other belongings, out of the property at the Government's direction. The decisions in which the standard of market value has been discussed and applied disclose nothing capable of justifying the

notion that fair market value is the exclusive measure. On the contrary, in the very process of applying the fair market value standard in the more frequent instances where the loss lent itself to such valuation because of the character of the condemnation, this Court has made it clear that it will create such working rules for arriving at just compensation as will assist in doing substantial justice between the parties, and it has sanctioned recourse to other data, as being appropriate for consideration, where the loss cannot be measured by the standard of fair market value normally applied. *United States* v. *Miller*, *supra*, 373, 374. If, as this Court said in that case, in an effort "to find some practical standard, the courts early adopted, and have retained, the concept of market value", it was in order to effectuate, and not to abrogate or stultify, the objective of putting the owner "in as good position pecuniarily as he would have been if his property had not been taken." To refuse to permit the items of cost and expense of removal incurred in this case to be considered as an element of compensable loss sustained by respondent, merely because the destruction of its use and occupancy is not measurable by the standard of market value applied in the ordinary case, would be to frustrate the attainment of the objective of making the condemnee pecuniarily whole.

Respondent's right to be made whole in respect of the cost and expense of removal from the property is accentuated by the temporary character of the Government's appropriation of the property for its own use. As far as the weight of the loss represented by the cost and expense of removal is concerned, respondent is in even worse position than the condemnee where the fee is taken or where the whole of the unexpired term of the lease is condemned. In this case, the termination of the Government's use and occupancy of the property several years prior to the expiration of respondent's lease in 1948 is responsible for one more loss, measured by the cost and expense of loss of the use and possession of the property,

than would be the case if the Government had condemned it for its own use for the remaining six years of the lease term, instead of only one. If the use had been condemned for the unexpired term of the lease, it would have been necessary that respondent move out of the premises once, in 1942 rather than at the expiration of the lease six years later. As the situation in this case actually stands, however, the condemnation for the temporary use of only one year means that, instead of moving out once and for all, in 1942 rather than six years later, respondent is obliged, by force of its obligation for the balance of the lease term, to move back again in order to reoccupy the property upon termination of the Government's temporary use, and then move out again several years later by reason of the expiration of the lease.

Since, in any event, respondent suffered a loss which would not have occurred but for the condemnation, this is fundamentally a plain case for putting it in as good position pecuniarily as it would have been if its use and occupancy had not been condemned, by allowing it to prove the cost and expense of taking down and moving out its equipment and facilities as a direct consequence of the destruction of its use and occupancy of the property. There is no issue in this case over any attempt on respondent's part to seek compensation for the value of the equipment and inventory which the Government says (Brief, p. 11) it did not take, since there is no dispute that the Government need not compensate respondent for the value of the equipment and inventory which it did not take for its own use. However, the simple justice which relieves the Government of an obligation to pay for the value of equipment and inventory it did not keep and use, or even for the value of respondent's use and occupancy as a business asset, requires that it bear the burden of the cost and expense of ridding the property of respondent's use and occupancy in order to reduce the property to the bare space it desired for its own use. It is consistent with the ends sought to be attained by the principle of

just compensation to compel the Government to do so. Such, in substance, is the conclusion reached by the Circuit Court of Appeals.

Affirmance of the decision of the Circuit Court of Appeals in this case by such a conclusion will not essentially disturb, and neither is it precluded by, this Court's decision in *Joslin Co.* v. *Providence*, *supra*, or the statement therein (p. 676) that "* * * Ordinarily, the cost of removing personal property from land taken is not a proper element of damage unless made so by express statute (2 Lewis on Eminent Domain, 3d ed., §728); and it was not an unconstitutional exercise of power for the legislature, in creating the right, to define its extent * * *."

The *Joslin* case did not concern the question of involuntary removal expense. The question there presented upon an application for injunctive relief involved an attack, under the Fourteenth Amendment, on a state statute which authorized a city to acquire land, machinery, interests and water rights necessary to a project of obtaining a supply of pure water. The statute contained a number of provisions concerning the basis upon which the city was to compensate owners of property taken for that purpose; one of them expressly allowed a mill owner the option between full compensation for the value of his machinery or to recover the reasonable cost of moving the machinery from the condemned property to a new location within the New England states and setting it up there. The owners of certain mill property affected by the condemnation assailed the statute on the ground, for example, that its provisions permitted "the owner of a business established prior to the passage of the act to recover for injury thereto, while withholding such compensation from one whose business has been established since" (p. 675), and further that in the provisions for compensation for removal of an owner's machinery, the statute made an unreasonable distinction between removal to one of the New England states and removal to some other area the owner

might prefer, as well as between owners before and after the date of the enactment of the law.

This Court was not called upon to, and in fact did not, decide anything, respecting the question of compensation for cost of removal, other than the question whether or not the provisions expressly defining the extent of the compensation created by the statute made for a reasonable classification within constitutional restraints, as is evidenced by the concluding clause in the statement just quoted, that "it was not an unconstitutional exercise of power for the legislature, in creating the right, to define its extent" (p. 676). Since the complete statement amounts to a generalization on the cost of removal from condemned land as an element of damage in a situation that was not before the Court, namely, where, because the condemnation statute contains no other provisions for compensation, the condemnee's right to just compensation under the Fifth Amendment will be judicially determined, it is not entitled to the dignity of a considered and authoritative pronouncement on the subject. Since the complaining mill owners were entitled under the express terms of the statute to full compensation for their land, buildings and machinery, it is hard to see how they were in a position to urge, against the constitutionality of the statute, that third parties might exercise an option as to removal that might be declined by them in favor of receiving compensation for the value of the machinery in place.

Even if it were regarded as, at most, some indication of a predisposition regarding the general question in the ordinary case, its value is clouded by the fact that the reference cited, 2 Lewis on Eminent Domain, 3d ed., Sec. 728, is hardly authoritative. It states "* * * but the damage to personal property, or the expense of removing it from the premises, cannot be considered in estimating the compensation to be paid." Passing by the extraordinary conclusion that damages to personal property are not recoverable (true if at all only under statutes like the one in Pennsylvania, giving an action in trespass

where personal property is taken or damaged) the footnote references show there is no such general rule. *Vide e. g., Philadelphia & Reading R. R.* v. *Getz*, 113 Pa. St. 214; *Chicago R. R.* v. *Hock*, 118 Ill. 587; *Atchison R. R. Co.* v. *Schneider*, 127 Ill. 144.

Indeed, the learned author in the preceding Section 727 says "* * * and a number of cases hold that cost of removal and interruption and damage to business may be recovered whether the whole or a part of a property be taken", citing, among others, *Chicago R. R.* v. *Hock*, 118 Ill. 587; *Atchison R. R.* v. *Schneider*, 127 Ill. 144; *Covington* v. *Piel*, 87 Ky. 267; *Grand Rapids*, v *Weiden*, 70 Mich. 390; *Commissioners* v. *Moesta*, 91 Mich. 149; *City of Detroit* v. *Brennan*, 93 Mich. 338.

The conflicting situation on the general question is well set forth in *McMillin Printing Co.* v. *Pittsburg C. & W. R. Co.*, *supra* (pp. 510, 511), cited by Lewis:

> "Whether, in an action by a tenant whose leasehold interest has been taken under the right of eminent domain, the cost of removing machinery used in the business in which he was engaged and losses directly resulting from interruption of the business can be considered, is a question on which the decisions are not harmonious. The market value of the land taken is the test universally applied in an action by an owner, and it is as accurate a measure of his loss as any that can be set up. What he is entitled to is the value of the land ascertained by a fair appraisement, and of this value the selling price of land similarly situated is *prima facie* the best evidence. But market value is an unsatisfactory test of the value to a tenant of a leasehold interest. It is really no test at all because a lease rarely has any market value. Generally it is not assignable at the will of the tenant, and he pays in rent all that the right of occupation is worth. The right of which he is deprived, and for which he is entitled to full compensa-

tion, is the right to remain in undisturbed possession to the end of the term. The loss resulting from the deprivation of this right is what he is entitled to recover. The value of the right he is forced to sell cannot ordinarily be measured by its market price, for there is no market for it; nor can it always be measured by the difference between the rent reserved and the rental value, if the lease should be a favorable one. If, as was the case here, a tenant, engaged in a business requiring the use of heavy machinery and appliances, should secure a new place equally well adapted to his business, and at the same rent, he would still be at the expense of removal and at a loss because of the stoppage of his business. These are matters to be considered in connection with others, not as substantive elements of damage, but as tending to prove the value of the leasehold interest."

In Randolph on Eminent Domain, §253, the rule is thus expressed "* * * the issue presented by these conflicting opinions is somewhat difficult. The strict rule certainly shuts out loose evidence which might tend to embarrass the judgment of the tribunal. On the other hand a conservative application of the liberal rule will permit the tribunal to consider real injuries suffered by the owner as the direct result of condemnation * * *".

In any event, the statement of the general rule in the ordinary case loses such value as it may be considered to have, standing by itself, when the Court is confronted with a case which challenges any application of the rule to its own facts. Respondent urges, therefore, that *Joslin Co. v. Providence* should not be permitted to stand in the way of an original and thorough examination of the question in this case, and that the only effect of a conclusion in respondent's favor would be to refine the *obiter* statement in that decision.

The lower court decisions cited by the Government against recovery of cost and expense of removal present

the conflict to be resolved by this Court's consideration of the question in this case as one of first impression, but they contribute nothing of value to an analysis or determination of the question (*United States v. Improved Premises, Etc.*, 54 F. Supp. 469; *Potomac Electric Power Co. v. United States*, 85 Fed. [2d] 243; *Gershon Bros. Co. v. United States*, 284 Fed. 849; *United States v. Building Known as 651 Brannan Street*, 55 F. Supp. 667; *United States v. Entire Fifth Floor in Butterick Bldg.*, 54 F. Supp. 258, 261; *United States v. 0.64 Acres of Land in Los Angeles County*, 54 F. Supp. 562). They are characterized by a sweeping generalization that removal expense is not compensable, in most instances on the supposed authority of the statement in *Joslin Co. v. Providence, supra*, and in two instances (*Gershon Bros. Co. v. United States*, and *United States v. Building Known As 651 Brannan Street*) the condemnation was for a period less than the unexpired term of the condemnee's lease, as in the instant case, or less than his property interest. The decision of the Court of Appeals of the District of Columbia in *Futrovsky et al. v. United States*, 66 Fed. [2d] 215, also cited by the Government, neither discussed nor decided this question. The owner of the meat business conducted on the property condemned in that case claimed that, because certain refrigerating equipment had become part of the condemned realty and did not, as the Government contended, remain removable personalty, the Government should take and pay for it. The situation was the same as if, contrary to the fact, respondent in this case had claimed that the Government should take and pay for the bins or other equipment and facilities in place. In the *Futrovsky* case, probably because the owner did not ask to be compensated for the cost and expense of taking down and moving out the equipment which he claimed the Government should take as part of the realty, the court did nothing more than to suggest, and then only fleetingly, the question of compensation for the cost and expense of removal, in the statement (p. 217) "The in-

convenience and expense of removing a going business and its equipment from property so taken cannot be paid for directly, and cannot operate indirectly to change a chattel into real estate."

II.

Allowance of cost and expense of demolition and removal will not result in recovery of consequential damages.

Another ground of opposition by the Government in this case is that the result would be to permit respondent to recover consequential damages which are by rule interdicted in condemnation cases. The Government can hardly mean to be understood as quarreling with the right to prove a loss, to the extent of the cost and expense in question, which satisfies, as much as this does, every legalistic or technical test of provable loss, from the standpoint of its causal proximateness to and identity with the taking of the use and possession of the property. If it is consequential in that sense, it is because, like any allowable damage, it is the direct consequence of the act which gives rise to the right of compensation.

Nor, unless the Government has totally misconceived the character of the consequential damages which a condemnee will not be permitted to recover, can it seriously contend for an application of the prohibition to this case. The authorities relied on by the Government demonstrate beyond question that consequential damages mean compensation for the value of business profits or opportunities lost as a result of the condemnation, or for the value of an advantageous location taken, or for damage to the value of the use of adjoining property not taken, or for damage of the speculative and conjectural value of similar factors. *United States ex rel. T. V. A.* v. *Powelson*, *supra*, 281; *Mitchell* v. *United States*, 267 U. S. 341;

Bothwell v. United States, 254 U. S. 231; *Justin Co. v. Providence*, *supra*.

In this case it is abundantly clear that the compensation that would result from allowing proof of items of the cost and expense in question would not in any wise involve damages in that category. The proof that was offered in evidence was confined specifically and exclusively to the definite items of the cost and expense of taking down, demolishing in part and removing the equipment and facilities used in the occupation of the property and in its business there, in the process of yielding the property to the Government for its own use and possession. An award of compensation for that kind of loss will not give to respondent one penny for damage to its business or for the deprivation of opportunities for profit, or of an advantageous location, or for any other thing of that nature. If respondent suffered any "frustration" as a result of the condemnation of its use and possession of the property, then recognizing the difference between frustration and appropriation,[2] it has made no claim in that respect; it seeks compensation only for the cost and expense necessitated by the expropriation of its use and occupancy of the property.

Such damage is not at all consequential within the meaning or scope of consequential damages prohibited to a condemnee in the absence of provision therefor in the condemnation statute. It is wholly outside the category of consequential damages which are dependent, for allowance, on express sanction in the condemnation statute. The silence of the Second War Powers Act respecting the right of a condemnee to be compensated for a loss such as the condemnation imposed on respondent in this case is not a valid reason for barring respondent's loss from consideration as an element of the just compensation to which it is entitled under the Fifth Amendment and the ascertainment of which is a judicial function. *Seaboard*

[2] *Omnia Co. v. United States*, 261 U. S. 502, 513.

Air Line Ry. v. *United States*, *supra*; *United States* v. *New River Collieries Co.*, *supra*.

The objection concerning consequential damages is, therefore, in complete disregard of the absence of any element of loss or damage in this case other than the cost and expense of removal in question. The Government has elaborated and garnished its objection concerning consequential damages with a number of decisions as authority for a proposition which respondent does not, and in this case need not, controvert because the question of just compensation pertains here to the cost and expense of removal actually and directly required by the expropriation of its use and occupancy of the property for the Government's temporary use, not to loss, destruction or frustration of its business, nor to the value of the equipment and inventory it removed. To say, as the Government does (Brief, pp. 6, 16), that not all injuries and business losses suffered by a condemnee are recoverable within the meaning of just compensation, and to pretend to support such a statement by reliance on losses with which respondent's claim for compensation in this case is not concerned, proves nothing. Least of all does it prove anything to rely on *United States ex rel. T. V. A.* v. *Powelson*, *supra*, in this connection, because the purport of the majority decision was that, if a condemnee will not be compensated for destruction or frustration of a going business, the power company in that case could hardly expect recognition of a claim to indemnification for frustration of a project that had not developed beyond the stages of a prospective plan when its property was condemned for the national project, and that would have depended for its accomplishment on a power of eminent domain which had not then been exercised. That decision clearly does not support the Government's contention either that indemnification of respondent for the cost and expense of removal in this case would mean an award of consequential damages such as are not allowed in con-

demnation cases, or that respondent should not be compensated for the empty reason that not all losses are compensable. On the contrary, if that decision has any effect in this phase of the instant case, it gives point, by contrast, to respondent's position that allowance of its actual, direct and specifically provable loss is not open to the objection which bars recovery of damages for frustration or loss of business, or to the particular objection which closed the door to an award of the compensation claimed by the owner in the *Powelson* case.

III.

The loss is compensable even though the cost and expense of demolition and removal be deemed to represent no tangible gain to the taker.

If respondent is correct in its analysis of the Government's position, the Government means that the loss for which respondent seeks compensation would result in consequential damages only in the sense that recovery would make respondent pecuniarily whole in respect of a loss which was an incident, unfortunate for respondent, of the Government's acquisition of the unoccupied space for its own use.[3] It is an argument, in effect, that while the Government did condemn property used and occupied by respondent, it desired only the unoccupied space for conversion to its own temporary use, and that it did not derive any benefit or value from the expropriation of respondent's use or from the cost and expense of preparing the property for the Government's own use of the unoccupied space.

[3] It is submitted that this meaning is borne out by the Government's statement (Brief, pp. 11, 12) that "The fact that personal property must be moved is incidental to the taking of the warehouse in which it was placed. It is not a taking or damaging of such property."

The fact is that, in condemning the property which the respondent was using, the Government did expropriate respondent's use and occupancy and compel it, at the cost and expense in question, to vacate the property for the Government's purposes. Such a contention, therefore, is an attempt by the Government to dodge responsibility for the consequences of its condemnation, on the ground that it need compensate respondent only for the value of the bare space which it received because, regardless of what it took and respondent's loss, that is all it kept and used. It is true that the Government did not actually appropriate or take the equipment, facilities and inventory by means of which respondent used the property condemned by the Government; if it had done so for the purpose of adopting them to its own ends and use, there would be little question of its obligation for just compensation for their value.[4] It is equally true, however, that it is not on that basis that respondent seeks compensation in this case. The compensation in question is for the loss resulting from the Government's destruction and expropriation of respondent's use and occupancy of the property which the Government condemned for its own use. As well might the Government argue that, if it requisitioned only the land and not the building upon it, the expense of removing the unwanted building would be a mere consequential damage not recoverable by the owner without express statutory authority. Such a novel doctrine would be an easy, if grotesque, road to condemnation since land improvements of no use to the Government are often many times more valuable than the land upon which they stand. While in some of the cases stress is laid upon fixtures, separable or not from the land, it is significant that the Fifth Amendment makes no distinction between real and personal property

[4] *Monongahela Navigation Co. v. United States*, 148 U. S. 312; *Phelps v. United States*, 274 U. S. 341; *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106; *DeLaval Co. v. United States*, 284 U. S. 61.

and requires that just compensation be made for any property taken.

That the Government, having no use for the equipment or such facilities as respondent employed there, did not want or take them for its own ends, or that it is not therefore called upon to pay compensation for them on that basis, does not alter the fact that the condemnation appropriated respondent's use and possession and it thereby sustained a loss that would not otherwise have been imposed on it, to the extent of the cost and expense of demolishing and removing the equipment and facilities. If it is to be put in as good position as it would occupy if the property had not been taken for the Government's temporary use, it should be compensated for that loss, without regard to the question whether or not the result would be to compel the Government to pay for something which, in contrast with the case of taking the equipment and facilities in place for its own use, contributed no positive value to the unoccupied space it received.

The Government's position to the contrary completely ignores the important consideration that it is the owner's loss, not the worth to the taker (of the bare space, in this instance), which is the measure of the just compensation capable of giving the full and perfect equivalent in money of the property taken and thus making the owner pecuniarily whole in respect of that which was taken from it. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 76; *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195; *United States* v. *Miller*, *supra*, p. 375. This is consistent with the equitable principles on which just compensation rests. By the same token that gain to the taker will not be permitted to redound pecuniarily to the owner's benefit by enhancing compensation for the loss, so the owner's loss will not be diminished by reason of the fact the loss involves an element from which the taker receives no specific benefit, as distinguished from the benefit inherent in the right to appropriate property to the taker's own use. The owner's loss is no less a loss for

which he should be compensated, merely because the taker cannot point to a benefit which matches or parallels every element of the owner's loss.

Under the principle involved here, just compensation for the owner's loss is the price the taker must pay for the benefit which accompanies exercise of the condemnation prerogative, without regard to any balancing of owner's loss and taker's gain. The exercise of the right to take exhausts the benefit enjoyed by the taker in the power of compulsion which resides in the prerogative; thereafter, the determination of just compensation for the taking should, in the very nature of the concept, be free of any consideration of further benefit to the taker. As well might the Government, if conceivably it were necessary that it compel the sale to it of a quantity of bananas, to use the homely example of a wartime scarce commodity, expect a reduction in price to allow for the useless skins, as to escape payment of provable damage by way of compensation for condemning respondent's use and possession of the property in this case on the basis that only the unoccupied space, not respondent's use of the space, was of any value to the Government for its own use.

Since the Government's condemnation of the property involved the expropriation and destruction of respondent's use in the very process of acquiring the unoccupied space it desired for its own use, and respondent lost both space and use, it should be compensated, to the extent of the cost and expense of demolition and removal, for the value of its loss of use and possession, even if the Government gained nothing from respondent's loss of use. As a matter of fact, while respondent has, for the sake of argument, assumed the absence of any specific benefit to the Government, the Government's objection to payment of compensation for the cost and expense of removal becomes even more indefensible if, abandoning that assumption, this Court is persuaded, as respondent is, that the Government benefited tangibly by respondent's removal of its equipment and inventory. Such removal involved

a cost and expense which inhered in the Government's condemnation of the temporary use of property burdened with respondent's use and occupancy. The benefit derived by the Government from the removal is not altered by the fact that respondent conducted it and initially incurred the cost and expense involved therein.

Before leaving this examination of the question raised by the Government concerning consequential damages, respondent deems it pertinent to add that, even if the compensation in question were considered as in the nature of such damages, it may nevertheless be recognized as recoverable on the same basis as so-called severance damage, as illustrated by the statement in *United States* v. *Miller*, *supra*, that (p. 376) "* * * If only a portion of a single tract is taken, the owner's compensation for that taking includes any element of value arising out of the relation of the part taken to the entire tract. Such damage is often, though somewhat loosely, spoken of as severance damage * * *".

Although such severance damage is not without a suggestion of consequential damage, it is permitted under one of the working rules which the courts have adopted, as this Court said in that case, to do substantial justice in eminent domain proceedings. In this case, for the same reason that the owner of a single tract is allowed to recover for the effect of the taking of only a portion of the tract on the value of what is left, respondent is entitled to be compensated for the consequences of a condemnation which, because it throws out respondent's use and occupancy of the property only for the duration of the Government's temporary use, compels respondent thereafter to reoccupy and resume use for the remaining term of the lease. The value of its right, prior to condemnation, to uninterrupted use and occupancy during the remaining six years of the lease term was diminished by the cost and expense, for which the condemnation of the temporary use was responsible, of moving out and then resuming

use of the property upon termination of the Government's temporary use and occupation of it.

Conclusion.

Respondent submits that, if it is to be made whole by a recovery of the just compensation to which it is entitled within the established meaning of the term, it should be accorded the right and opportunity to prove the cost and expense which constitute and measure the loss sustained by it as a result of the expropriation of its use and occupancy of the condemned property for the Government's temporary use. A sound, reasonable and just application of the principle which actuates the right to just compensation invites the conclusion that the damage or loss to the condemnee, to the extent of the cost and expense of removing all physical embodiments of the expropriated use and occupancy, is not to be excluded from consideration of the just compensation recoverable for the property taken.

It is respectfully submitted, therefore, that the judgment of the Circuit Court of Appeals should be affirmed.

November 1944.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944.

No. 76

UNITED STATES OF AMERICA,
Petitioner,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

BRIEF OF ZELLERBACH PAPER COMPANY (A CORPORATION), AS AMICUS CURIAE, ON BEHALF OF RESPONDENT, GENERAL MOTORS CORPORATION.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 76

UNITED STATES OF AMERICA,
Petitioner,
vs.
GENERAL MOTORS CORPORATION,
Respondent.

BRIEF OF ZELLERBACH PAPER COMPANY (A CORPORATION), AS AMICUS CURIAE, ON BEHALF OF RESPONDENT, GENERAL MOTORS CORPORATION.

STATEMENT OF INTEREST OF AMICUS CURIAE.

Zellerbach Paper Company, a corporation, respectfully asks leave to file this brief, as *amicus curiae*, on behalf of the respondent, General Motors Corporation.

Zellerbach Paper Company is engaged in the wholesale distribution and sale of various kinds of merchandise. It owns a warehouse situated in the City of

Los Angeles, California. This warehouse was formerly used in its business and was specially designed and equipped for this purpose. The property is now and has been in the possession of the United States of America since December 9, 1942. Possession of this property was taken by the United States pursuant to the provisions of Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177c, 199, sec. 201, 50 U.S.C. App. Supp. III, sec. 632. The United States has not taken a fee in this property, but only the temporary use thereof, for a term of years, renewable at its option.

There is now pending in the District Court of the United States in and for the Southern District of California, Central Division, an action entitled, "United States of America, Plaintiff, vs. 6.35 Acres of Land More or Less, etc., Zellerbach Paper Company, a corporation, et al., Defendants", No. 3132-H Civil, on the records and files of said District Court.

In said last-named action, there will be determined, in the first instance, the "just compensation" to be awarded to Zellerbach Paper Company for the taking of its warehouse. The questions of law which are to be determined in the action, in which Zellerbach Paper Company is defendant, arise out of facts substantially similar to those which are before this Honorable Court in this case. The decision of this Court in the present cause may establish a precedent which may be binding upon the said District Court, not only in ruling upon the admissibility of evidence to be offered by the par-

ties on the issue of "just compensation", but also as to the elements which constitute such compensation.

In this brief, the *amicus curiae* intends to support the contentions of the respondent General Motors Corporation.

OPINIONS BELOW.

The District Judge of the United States before whom the cause was tried did not write an opinion. The opinion of the Circuit Court of Appeals (R. 114-123) is reported in 140 Fed. (2d) 873.

JURISDICTION.

The jurisdiction of the Court was invoked by the petitioner, United States of America, under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

The United States sets forth in its brief the following statement of the question presented:

> "Whether, in a proceeding by the United States to acquire the temporary use of business property, necessary expenses incurred by the lessee in vacating the premises constitute an element of 'just compensation' within the Fifth Amendment."
>
> (Brief for the United States, pp. 1-2.)

The foregoing statement appears to ignore one of the important elements of the question involved, and for this reason the *amicus curiae* re-states the question as follows:

> Whether, in a proceeding by the United States to acquire the temporary use of business property, necessary expenses incurred by the lessee in installing property and equipment to make the property suitable to its business and in vacating and preparing the premises for occupancy by the United States constitute an element of "just compensation" within the Fifth Amendment.

STATEMENT OF THE CASE.

The statement of the case contained in pages 2 to 5 of the government's brief is substantially correct, except for the matter hereinafter noted.

At page 3 of the brief, the following footnote appears:

> "The word 'demolished' as used in the offer of proof referred to the dismantling of equipment and not its destruction. The property and inventory removed were not fixtures. As General Motors' offer of proof states, the property 'demolished' (i.e., dismantled and removed) was 'bins and other personal property'."

The statement contained in this footnote is not entirely accurate, as it appears from the record and from the statement contained in the brief at page 4 thereof that the respondent's offer of proof sets forth that bin equipment of the value of $5062.90 was de-

stroyed when the removal was carried out. (Offer of Proof No. 33, R. p. 53.) The word "destroyed" being synonymous with the word "demolished", it is submitted that when used in the offer it did not refer alone to the dismantling of the equipment, but also to its destruction.

ARGUMENT.

A. THE FAIR DETERMINATION OF JUST COMPENSATION FOR THE TAKING OF TEMPORARY USE OF REAL PROPERTY REQUIRES THAT THE PERSON HAVING THE RIGHT TO THE USE AND OCCUPANCY THEREOF BE PERMITTED TO SUBMIT TO THE JURY MAKING SUCH DETERMINATION PERTINENT EVIDENCE OF THE "VALUE IN USE" TO IT OF SAID PROPERTY AND OF ALL THE COST INCURRED IN PUTTING SAID PROPERTY TO EFFICIENT USE.

At the trial of the action, during the examination of respondent's witness Charles R. Thorp (R. pp. 28-43), he was asked to describe any special facilities which aided the operations conducted by the respondent in the warehouse (R. p. 39), and, in reply to this question, the witness testified that:

> "The building had particular value for the operation, from the fact that it is one-story and had the necessary truck and rail facilities to efficiently handle the products in and out of the building."
>
> (R. p. 40.)

Upon motion made by the government's attorney, this answer was stricken. (R. pp. 40-41.)

Thereafter, the respondent made the following offer of proof, which was rejected by the District Court:

"Defendant offers to prove by Mr. Charles Essex that defendant had at the premises in Clearing installed equipment in the amount of approximately $101,000, consisting of bins and other facilities for a central distributing point; that it had at said location an inventory of parts and machinery of approximately $250,000; * * *"
(R. p. 49.)

We contend that the above-quoted testimony should not have been stricken and that the offer of proof should not have been rejected. The excluded evidence was admissible on two grounds:

1. As pertinent evidence of the value in use of the warehouse to respondent; and

2. As pertinent evidence of the cost of putting the property to efficient use.

1. As pertinent evidence of the value in use of the warehouse to respondent.

We have long recognized that "no piece of land has its counterpart anywhere else and is impossible of duplication by the expenditure of any amount of money".[1]

On the basis of this principle, our Courts have uniformly ruled that money damages do not adequately compensate for the loss of land. However, we also recognize that when land is rightfully taken by the government through eminent domain proceedings the only compensation possible is an award of damages to the expropriated owner. And it seems to be gen-

[1] 49 Amer. Jur. 107, Specific Performance, sec. 92.

erally conceded that such compensation is seldom full or adequate. Therefore, in eminent domain proceedings, and in consonance with sound principles of justice and economics, the unique quality of land as property is admitted and compensation for its taking is not based solely on market value, that is, what others than the owners would pay for it, but also on its *value in use to the owner*. That failure to give consideration to these principles would result not only in gross under-indemnity to the owner, but would also constitute an unwarranted departure from sound economic doctrine, is the view expressed by Mr. Bonbright, from whose work, "The Valuation of Property",[2] we quote the following excerpts:

> "* * * Real property belongs in that class of wealth which is often worth more to a given owner than to any prospective purchaser. This is true because, instead of being standardized like wheat, or government bonds, or tubes of shaving cream, improved real estate may be specially constructed for, or adapted to, the peculiar needs of its occupants. If the United States Steel Corporation were to be reimbursed for its Gary plant at the mere price at which this company could sell it to some rival enterprise, or if the owner-occupant of a house and lot were to be forced to vacate it on payment of nothing more than the price at which he could market it, gross underindemnity might well result. Yet, if market value is accurately construed, only sale price can properly be allowed. On the other hand, if it is so construed as to include the special value of the property to

[2] James C. Bonbright, "The Valuation of Property" (McGraw-Hill, 1937, two volumes).

the owner, it becomes an unfortunate synonym for this latter standard of value.

* * * * * * *

"But even when the market-value criterion is rejected, the courts by no means invariable turn openly to the alternative of special value to the owner. Perhaps more frequently they invoke some completely undefined, mythical concept of 'real' or 'actual' value—a value supposedly inherent in the property itself without reference to the peculiar relations between the owner and his valued possession. This economic heresy, which pervades the literature on the Continental law of expropriation and taxation (under the heading of 'objective value' or 'value to everyone') no less than American law (under the heading of 'real value' or 'intrinsic value'), goes hand in hand with the orthodox doctrine of eminent domain as constituting a proceeding *in rem* rather than a proceeding *in personam*—a doctrine, some of the implications of which have been violated under more modern theories of jurisprudence."[3]

In addition to the compulsion exercised by the duty to adhere to sound principles, there is another equally valid reason which compels the Courts to give consideration to the value in use of a particular property to the owner. It is almost universally conceded by the Courts that the "just compensation" referred to in the Fifth Amendment to the Constitution is a compensation sufficient to make good the loss to the owner, and it is asserted that a corollary to this proposition is that when property is taken its value to the owner

[3]Bonbright, op. cit., pp. 415-416; p. 420.

is the only strictly relevant value to be considered. This proposition, and its corollary, has been thus stated by Mr. Lewis Orgel in his treatise "Valuation Under the Law of Eminent Domain",[4] at page 146:

> "'Just compensation', say the courts of this country including the highest court, is a compensation sufficient to make good the loss of the owner. In the words of Mr. Justice Butler, the owner is 'entitled to the full money equivalent of the property taken, and thereby to be put in as good a position pecuniarily as it would have occupied, if its property had not been taken.'
>
> "A corollary of this proposition would seem to be that, when property is taken, its value to the owner is the only strictly relevant value, and that market value is acceptable only to the extent that it may be taken as a rough, practical measure of value to the owner. Precisely this reason for the adoption of the market-value rule has been adduced by the courts."

It would seem to follow, from the foregoing, that, if "market value is acceptable only to the extent that it may be taken as a rough, practical measure of value to the owner", then, when it does not meet this test, it should be disregarded and reliance placed upon the value to the owner alone. However, the Courts have not always, in practice, followed through to the conclusion that Mr. Orgel's postulate compels, but have, nevertheless, considered such value in use as evidence of market value. Thus, in the California case of

[4]Lewis Orgel, "Valuation Under the Law of Eminent Domain" (one volume, The Michie Company, 1936).

Oakland v. Pacific Coast Lumber etc. Co., 171 Cal. 392, 400, 153 Pac. 705 (1915),

where it is stated that:

> "* * * Nor yet has this court ever said that *the value in use*, as contra-distinguished from the estimated value of a proposed problematical use, *might not be given in terms of money, not as determinative of the question, but as being evidence of the ultimate fact which the jury is called upon to find, namely, the market value* * * *" (Italics ours.)

Mr. Bonbright opines that, although this Court has declared that the objective in eminent domain proceedings is fully to indemnify the owner, it has, in practice, applied "fair market value" as the universal criterion and entirely ignored value to the owner, and in this connection states:

> "The vital distinction between the value to the owner of property especially adapted to his needs, and the market value of that same property, has been generally ignored by the Supreme Court. This Court has often talked as if 'fair market value' were the universal criterion under the law of eminent domain. Yet, in the very cases in which it has invoked this standard, it has also declared that the objective is fully to indemnify the owner for what *he* has lost; and it has even referred in so many words to 'value to the owner' as the proper measure of compensation and as if it were a perfect synonym for 'fair market value'."[5]

[5]Bonbright, op. cit., vol. 1, p. 421.

We do not believe that the foregoing is an accurate statement of the position taken by this Court. The fact appears to be that the issue of real, actual value in use to the owner has never been presented to the Court. Rather, the Court has been asked to rule that the owner is entitled to show the value of some hypothetical or proposed problematical use, as was the case in

U. S. ex rel. T. V. A. v. Powelson, 319 U. S. 266, 63 S. Ct. 1047, 87 L. Ed. 1390 (1943),

where this Court was asked to hold that the owner was entitled to show the value in use of a hypothetical hydroelectric project.[6] This the Court refused to do, but in so doing re-stated the principle for which we contend, in the following language:

> "An owner of lands sought to be condemned is entitled to their 'market value fairly determined'. United States v. Miller, 317 US 369, 374, ante, 336, 342, 63 S Ct 276, 147 ALR 55. That value may reflect not only the use to which the property is presently devoted but also that use to which it may be readily converted. Mississippi & R. River Boom Co. v. Patterson, 98 US 403, 25 L ed 206; McCandless v. United States, 298 US 342, 80 L ed 1205, 56 S Ct 764. * * *"[7]

Obviously, "the use to which the property is presently devoted" refers to the use the owner was making of the premises at the time of the taking; and it is equally obvious that it is that use which he loses by the taking. Therefore, if, as universally conceded, com-

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[6] *U. S. ex rel. T. V. A. v. Powelson, supra*, 274-275.
[7] *U. S. ex re. T. V. A. v. Powelson, supra*, 275.

pensation is measured by the owner's loss,[8] there is no reason why the respondent in this cause should not be permitted to show the use to which it was devoting its property—the use which it has lost by the taking—and, indeed, a fair determination of the market value of the property would require the submission of this evidence to the jury—otherwise, how might this use be reflected in "market value"?

It is, therefore, submitted that the testimony describing the facilities which aided in the use and operation of respondent's property should not have been stricken (R. pp. 39, 40, 41), and that the offer of proof which referred to the installed equipment and inventory carried (R. p. 49) should not have been rejected, for the reason that, without this evidence, the market value could not be fairly determined, the jury not having been afforded the opportunity of determining whether the use of the property might be reflected in its assessment of market value.

2. As pertinent evidence of the cost of putting the property to efficient use.

The testimony stricken by the lower Court, that in which Mr. Thorp described the particular value which the premises had for the operations conducted by the respondent (R. p. 40), laid the foundation for the introduction of the evidence referred to in the rejected offer of proof, to-wit, the cost of the equipment installed and the value of the inventory maintained. The matter involved in the rejected offer of proof was

[8] *U. S. ex rel. T. V. A. v. Powelson*, *supra*, p. 281.

relevant to the cost of production and reproduction of the premises as a going and operated warehouse, but, as a necessary prerequisite to its admission in evidence, the respondent was required, as it did, to show that the property was efficient and of particular value to the operations conducted by it. In the absence of such a showing, or if it were positively shown that the warehouse was inefficient and wasteful, no one would be interested in its cost of production or reproduction, and then such cost would be irrelevant and the property would be worth only what it would bring as vacant, non-operating property. (Orgel, op. cit., sec. 191, p. 600.)

Once having established value in use, the respondent was entitled to prove "going concern value" in the sense of a cost item entering into the estimate of cost of reproduction of the warehouse.

> "But in the eminent domain cases, unless the entire enterprise is being condemned, the owner is not entitled to compensation for the value of the business over and above the property taken. Consequently, in these cases it make a difference whether 'going concern value' is used in the sense of a cost item entering into the estimate of cost of reproduction or whether it is considered as a value in excess of the reproduction cost of the physical property. *In the former sense, 'going concern value' is admissible as bearing on the cost of reproduction.* In the latter sense, it is an element of the value of the entire enterprise for which no compensation is awardable and it is therefore immaterial." (Italics ours.)
>
> Orgel, op. cit., sec. 191, p. 599.

And, in proving the cost of reproduction, the owner is entitled to show every necessary expenditure made in producing a live, going, efficient and functioning plant.

United States v. Becktold Co., 129 Fed. 473, 478 (1942);
Sparkhill Realty Corp. v. State, 242 App. Div. 862, 865-866, 275 N. Y. Supp. 766 (1934);
Banner Milling Co. v. New York, 240 N. Y. 533, 543-545, 148 N. E. 668, 671-2;
41 *A. L. R.* 1019, 1025 (1925);
White v. Cincinnati, etc. R. R. Co., 34 Ind. App. 287, 293-4, 71 N. E. 276, 278 (1904).

The operation of the rule contended for is best illustrated by the cases of *Banner Milling Co. v. New York, supra*, and *Sparkhill Realty Corp. v. State, supra.*

In the case of *Banner Milling Co. v. New York*, the Court of Claims had in the first instance assessed the compensation due to the owner of an operating flour mill which had been condemned by the State of New York. At the trial the owner showed, and the lower Court found, that "the fair value of architects and engineers' fees upon the construction and equipment of said plant, insurance premiums and interest on investment during construction period, railway franchises, legal expenses, sundry items correcting errors in construction, expenses incurred in operating mill at a loss up to time when machinery is synchronized and coordinated so as to produce satisfactory results is the sum of seventy-five thousand dollars ($75,000)." (240 N. Y. 544-5.) The Court of Claims refused to

award to the owner the specific sum so expended and in so doing made the following statement of principles it would follow in fixing the owner's compensation:

> "'*The claimant is entitled to recover the value of its physical property as it existed at the time of the appropriation.* That does not mean that its value is to be arrived at by taking the value of the various elements and items making up the property separately, and considering them without reference to each other, and then adding together these sums. The claimant is entitled to compensation, not merely for so much land, so much brick, lumber, materials, and machinery, considered separately; *but, if they have been combined, adjusted, synchronized, and perfected into an efficient functioning unit of property, then it must be paid for that unit, so combined, adjusted, synchronized, and perfected, as it existed at the moment of appropriation. In that limited sense, it is entitled to the "going value"—if such a term is permissible—of its physical property. In fixing the amount of award we will be guided by that principle.*'" (240 N. Y. 544.) (Italics ours.)

On the appeal, the New York Court of Appeals upheld the refusal of the Court of Claims to award the specific sum claimed for expenses incurred in making the mill an efficient functioning unit, but held at the same time that the lower Court had properly considered all of these items in arriving at the value of the mill, and said:

> "Nowhere does it appear, however, that all these elements making up this $75,000 expense were not considered by the court in arriving at its total

figure of valuation. What element it considered or excluded is not stated. As I have said, the claimant was not entitled as a matter of law to recover these expenses; *it was entitled to have them considered as necessary in building up and constructing the mill as a going concern, efficient and appropriate for the business.*" (240 N. Y. 545.) (Italics ours.)

Equally specific on the expenditures which may be considered in measuring the ultimate award is the case of *Sparkhill Realty Corp. v. State, supra,* where it is stated:

> "It is doubtless true that the expenses incurred in the development of the property may be properly considered in determining its value when taken, such as cost of surveying; or architecture and engineering, of the purchase, trial and replacement of fixtures, legal expenses and payroll growing out of the work of development." (242 App. Div. 865-6.)

It is clear that under the above cases the evidence relating to the cost of bins and facilities installed and inventory carried by respondent in its warehouse falls squarely within the category of expenditures which must be considered in arriving at the cost of reproduction.

We submit further that it is immaterial whether these items of cost and expense are looked upon as personal property as regards their origin, because if they contribute to the efficient operation of the warehouse they are as relevant to the issue as "expenses incurred in *operating mill at a loss* up to the time

when machinery is synchronized and coordinated so as to produce satisfactory results", an item which the New York Court of Appeals, in *Banner Milling Co. v. New York, supra,* held was properly before the lower Court in the assessment of compensation. In other words, these items are merged with the functioning structure, and thereby lose their original identity.

It is self evident that the efficiency as a functioning unit of the warehouse could not be determined or tested before bins and other equipment for the storage and movement of inventory had been installed, or before the stock carried was stored and moved—up to that time the property had the status of vacant, non-operated property. It is equally self evident that the cost of such equipment, its installation, necessary re-arrangement, etc., as well as the cost of moving a large stock of merchandise in and out of the premises during the test or trial period was a necessary expense of putting the property in efficient use. These overhead costs have been entirely lost to respondent, and although they may not be easily allocated to the cost of the physical structure, they contributed to and are part of its value in use or "going concern value" and must, therefore, be considered in arriving at these values.

> "In one sense, going concern value is a mere synonym for overhead costs, that is, expenditures not easily allocated to other physical costs, but to be considered with these other charges in arriving at the cost of reproduction."
>
> Orgel, op. cit., sec. 191, p. 597.

Accordingly, it is submitted that the rejected evidence was material and relevant, not only to the value in use of the property, but also as an item of expense to be considered in arriving at the cost of reproduction of the premises.

B. IN A PROCEEDING TO ASSESS "JUST COMPENSATION" FOR THE TAKING OF TEMPORARY USE OF PROPERTY, THE OWNER, OR THE PERSON HAVING THE RIGHT OF POSSESSION, IS ENTITLED TO PROVE OUT-OF-POCKET EXPENSES REASONABLY AND NECESSARILY INCURRED IN VACATING THE PREMISES AND PREPARING THEM FOR THE GOVERNMENT'S TEMPORARY OCCUPANCY.

It is clear that, under the facts of this case, the respondent is entitled, under its contract or lease, to the exclusive use and occupancy of the property in question. The lease extends until May 31, 1948 (R. p. 91) and the government has taken the respondent's right of exclusive use and occupancy for the period of only one year. The lease, therefore, is still in effect, and the respondent is still subject to the duties thereby assumed, including the payment of rent, and remains entitled to the use and occupancy of the premises until the end of the term, except for the temporary taking of this use and occupancy by the government for one year. Obviously, therefore, the government has not taken the lease, but only the respondent's right of the use thereunder, and is not obligated to pay for the lease, but only for the temporary use thus acquired.

Under such circumstances, the respondent has, for the purposes of this action, the position of an owner occupying and using its property whose use and occupancy is temporarily suspended by government action. This being so, the respondent has the right to prove, in addition to the value in use and cost of putting the property to efficient use, any other pertinent evidence bearing on the question of the value of this temporary deprivation of use, as well as the diminution of the value of the use of the property to it during the period of the government occupancy. To this end, the respondent offered to prove, at the trial of the action, that it had expended the total sum of $53,451.64 in vacating and preparing the property for the government's temporary occupancy. This sum included amounts expended in salaries, packing materials, tools, storage and freight charges. (Offers of Proof, 1 to 32; R. pp. 50-53.) The respondent also offered to prove that it lost the sum of $30,062.92 in the value of equipment destroyed and labor, installation and freight costs on fixed assets as the result of the dismantling of its plant. (Offer of Proof, No. 33; R. pp. 53-54.) The record clearly indicates that, if the respondent had been able to make proof of these expenditures, it would also have proven that they were reasonably and necessarily made, and resulted directly from the temporary taking of its property. (R. p. 54.)

We contend that this evidence should not have been rejected, as it was admissible on two grounds:

1. As pertinent evidence of the rental value; and

2. As pertinent evidence of the diminution of the value of the use of the property during the period of governmental occupancy.

1. As pertinent evidence of the rental value.

In 1866, the Court of Claims of the United States, in its decision in the case of *Johnson v. United States*, 2 Ct. Cl. 391 (1866), established a rule for the measurement of compensation in cases of temporary takings, which it has consistently applied in all such actions.[9]

In the first *Johnson* case (2 Ct. Cl. *supra*), the Army occupied, temporarily, land belonging to Johnson, and in seeking compensation for such occupancy Johnson urged that the measure of his compensation should be the value of the fee. The Court rejected this contention and held that the rule to be applied was that adopted as the measure of damages in actions for *mesne profits*. We quote the reasoning and conclusion of the Court of Claims, as follows, at pp. 415-416:

> "Regarding this, then, as an action on an implied contract, we must determine what it is which the government has taken. The claimant has given evidence of the value of the fee, and insists that it is the measure of his damages. The court is of a different opinion. We think that there is nothing to show such an intent on the

[9] *Johnson v. United States*, 4 Ct. Cl. 248 (1868); *Pope v. United States*, 26 Ct. Cl. 11 (1890); *Johnson v. United States*, 8 Ct. Cl. 243 (1872).

part of the government or to establish anything beyond the temporary occupation already pointed out. We therefore think that the measure of the damages must be limited to the value of this temporary occupancy, as though the claimant had leased and the government had rented the premises, regard being paid to the nature of the occupancy and to the fact that the government had the option of discontinuing the implied tenancy on any day or of retaining it indefinitely. ***This also is the rule which courts have adopted as the measures of damages in actions for mesne profits, and the only rule which can be made applicable to the case.*** We therefore must assume that at the time of the entry upon the premises the claimant was willing to lease and the government was willing to rent the premises with the rights and privileges and upon the conditions before enumerated at the fair or market value of an annual rent; * * *." (Italics ours.)

In the second *Johnson* case (4 Ct. Cl. 248), the Court explained its holding in the parent case, as follows:

"When the case came to be tried, we were satisfied that the government had not taken his property for a fixed military reservation, but, on the contrary, occupied it temporarily and at its own will. It was the first case which had ever come before the court where the question of title to land was in controversy, *and the court had to settle a general principle applicable to all cases which were similar in effect to actions in ejectment, and yet in which the defendants, though defeated, could not be ejected.*

"When a person wrongfully enters upon an estate, he who has the right of possession may evict him; or, if one acquires an apparent right of possession, he who has the actual right may eject him at law, and have damages in the nature of mesne profits for the withholding. But such possessory actions cannot be brought against the government. Though it enters against the consent of the owner *and holds without having a right of property,* it still holds rightfully under its right of eminent domain. The holding being lawful, the question is, upon what terms does the government hold? This question the Constitution answers by the words 'just compensation'. *The use and occupation are private property 'taken for public use', and the supreme law of the land fixes the rent at a 'just compensation'.* It is this provision of the Constitution which upholds our general doctrine of implied contracts; for damages *quantum meruit* are nothing more or less, in the absence of an express contract or of an appraisement by legislative discretion, than the 'just compensation' of the Constitution. We accordingly determined that, when the government has entered upon the realty of a citizen, on his right of property being established, the government should be deemed to have entered as his tenant under an implied lease, whereof the 'just compensation' secured by the Constitution to those whose property is taken for public use should be the rent." (pp. 249-250.) (Italics ours.)

It is to be assumed that the Court of Claims, in applying and adopting a rule derived from actions in ejectment, had in mind that in such actions, as

well as in eminent domain proceedings, the object is to make the owner *whole* for the use and occupancy taken from him, and that to this end the compensation must be sufficient to make good his loss, thereby putting him in as good a position, pecuniarily, as if his property had not been taken; and also that in such actions and proceedings the value of the property to the owner is the only strictly relevant value, and that "market value is acceptable only to the extent that it may be taken as a rough, practical measure of value to the owner." (See *supra*, pp. 8-9.)

In ejectment actions, the rule is that "the desseizee is entitled to all he has lost, be it more or less than the rental value, and additional damages will be awarded, if necessary for making plaintiff *whole.*" (28 *C.J.S.* 1035, *Ejectment,* Sec. 144.)

It follows that a strict application of the rule laid down by the Court of Claims in the *Johnson* case—one derived from actions in ejectment—requires that when the market value of the rental does not make the owner *whole,* this measure of compensation must be disregarded and instead there must be adopted a standard of compensation which includes or comprehends, in the determination of rental value, a consideration of all the damages suffered by the owner.

> "Thus far, in speaking of 'rental value' we have used the term in the restricted sense which the defendant and many of the cases ascribe to it. *There is, however, a broader sense in which the term is used; in the latter use it comprehends all*

that is included in the term 'damages'. * * * (Italics ours.)

Capital Garage Co. v. Powell, 98 Vt. 303, 310, 127 Atl. 375, 378 (1925).

This Court has had, in the past, before it cases involving the expropriation and frustration of contracts, but, so far as we know, the only case ever before presented to this Court involving the temporary deprivation of use of contract rights in real property is that of *International Paper Co. v. United States*, 282 U. S. 399, 51 S. Ct. 176, 75 L. Ed. 410 (1931). This cause did not involve the total expropriation of a contract, as in *Brooks-Scanlon v. United States*, 205 U. S. 106, 44 S. Ct. 471, 68 L. Ed. 943 (1924), nor the frustration of a contract as in *Omnia Commercial Co. v. United States*, 261 U. S. 502, 43 S. Ct. 437, 67 L. Ed. 793 (1923).

In the case of *International Paper Company, supra*, it appears that the Niagara Falls Power Company, by grant, had the right to take water from a certain canal for conversion into electric power. From this canal, the petitioner, the International Paper Company, was entitled, by conveyance and lease, to draw water to run the machinery of a paper mill owned by it—*"a right that by the law of New York was a corporeal hereditament and real estate."* (p. 405.) The United States directed the Niagara Falls Power Company to take the water theretofore used by the International Paper Company and to divert the power generated therefrom to the use of concerns engaged in

industries essential to the national defense. International Paper Company was thus deprived of the use of the water for approximately ten months, and was thereby forced to shut down its paper mill for this period. (pp. 405-406.) When the case was before the Court of Claims (68 Ct. Cl. 414), that Court found that:

(a) the mill could be operated economically only through the use of water and electric power, and that neither was available to the claimant (68 Ct. Cl. 423);

(b) during the period of the shut-down, the mill sustained an actual out-of-pocket or direct overhead expense of $304,685.52, because of the shut-down, and that this loss would not have been sustained if the mill had been able to operate (68 Ct. Cl. 432); and

(c) the price of the power during the period of suspension had increased from $20.00 to $33.00-$47.65 per h.p. per annum. (68 Ct. Cl. 432.)

Notwithstanding the finding of the damage suffered by claimant as a direct result of the shut-down, the Court of Claims dismissed the action, on the ground that claimant's contract rights to water had been frustrated, not taken, and based this ruling on *Omnia Commercial Co. v. United States, supra.* Thereafter, the action came before this Court on a writ of certiorari. The judgment was reversed and this Court, speaking through Mr. Justice Holmes, did not find that the petitioner's contract rights had been taken or frustrated. It found, rather, that its right to use the water had been taken by the United States for the

period of the shut-down, through the exercise of the power of eminent domain. We quote the opinion as follows:

"* * * The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power, it is hard to see what more the government could do to take the use. It is true that the petitioner did not come within the scope of the government's written promise to pay. But the government purported to be using its power of eminent domain to acquire rights that did not belong to it and for which it was bound by the Constitution to pay. It promised to pay for all the power that the canal could generate. If it failed to realize that the petitioner had a right to a part of the power, its clear general purpose and undertaking was to pay for the rights that it took when it took the power. Phelps v. United States, 274 U. S. 341, 343, 71 L. ed. 1083, 1084, 47 S. Ct. 611; Campbell v. United States, 266 U. S. 368, 370, 371, 69 L. ed. 328-330, 45 S. Ct. 115; United States v. Great Falls Mfg. Co., 112 U.S. 645, 656, 28 L. ed. 846, 850, 5 S. Ct. 306. * * *

"We perceive no difficulty arising from the case of Omnia Commercial Co. v. United States, 261 U. S. 502, 67 L. Ed. 773, 43 S. Ct. 437. There the taking of the whole product of a company went no further than to make it practically impossible for that company to keep a collateral contract to deliver a certain amount of steel to the appellant. But here the government took the property that the petitioner owned as fully as the power company owned the residue of the water

> power in the canal. Our conclusion upon the whole matter is that the government intended to take and did take the use of all the water power in the canal; that it relied upon and exercised its power of eminent domain to that end; that, purporting to act under that power and no other, it promised to pay the owners of that power, * * *." (pp. 407-408.)

We regard it as significant that this Court noted, with respect to the above-referred to findings of the Court of Claims, only that the petitioner's temporary deprivation of the right to use its "real estate" cost it $304,685.36 direct overhead expense.

> "The Court of Claims found that the shutting off of the water from the petitioner's mill cost it $304,685.36, direct overhead expense, but gave judgment that the petition be dismissed." (p. 406.)

We do not say that there is anything in this Court's opinion which would entitle us to claim that this Court held therein that in similar actions the direct losses sustained by the expropriated owner are to be considered in the assessment of compensation, but it does seem to us that the failure of the Court to comment on the market price of the power which could have been generated, and the positive comment on the losses incurred by the petitioner, can be taken as an indication that this Court had in mind that, of the elements found by the Court of Claims, the most important was the owner's loss, and not the price which the temporary use of its property would have commanded

in the open market, nor the benefits derived by the government therefrom.

In the case at bar, as in the *International Paper Company* case, *supra*, the expropriated owner is subjected to as much loss and expense by the temporary relinquishment of its property as if its rights had been taken once and for all time, and yet the government contends that the measure of compensation is the amount that these rights would have brought in the market for a period limited to the time of government use or occupancy.

The inequity of the government's contention and procedure is patent: the expropriated owner is forced to make all the expenditures that an outright sale of his property would have entailed and yet he receives, by way of alleged rental, only a fraction of the value his property would have brought if sold.

The invalidity of the ground upon which the government pretends to sustain its position is equally manifest. Its argument, as we apprehend it from the cases cited, is that *the government's action merely changes the date of the lessee's removal and entails no damage which he would not incur in any event.* The foregoing is the gist of the reasoning adopted by the courts in *Gershon Bros. Co. v. United States*, 284 Fed. 849 (1922), and in *Wm. Wrigley, Jr., Co. v. United States*, 75 Ct. Cl. 569 (1932).

In *Gershon Bros. Co. v. United States*, the Court said, at page 850:

> "* * * Inconvenience and expense incident to vacating premises upon the expiration of the

> right to retain them are not proper subjects of consideration, in determining the just compensation to be paid by the party acquiring the right to possess and use them. * * *"

and in *Wm. Wrigley, Jr., Co. v. United States*, it said (p. 584):

> "* * * The expenses incurred by the plaintiff in moving from the terminal to the new site were those which it would have sustained at the termination of its leases, consequential in their nature, and for which there is no recovery."

In both cases, the reasoning of the Court was that expenses incurred upon *the expiration of the right to retain the property* are not to be considered. That this reasoning is not applicable to the case at bar is patent. The respondent's right to retain the premises *has not expired*, and its lease has not been terminated. We maintain, therefore, that, while the right to retain and occupy the premises subsists, the expense of removal is one which vitally affects the value of the property.

Another ground on which the government seeks to have ignored the loss to the owner is the contention that just compensation, under the Fifth Amendment, is for the property and not for the owner. (Brief for United States, p. 8.) That this is not the interpretation that this Court has placed on the just compensation provided for in the Constitution is clear from the following statement taken from *Boston Chamber of Commerce v. Boston*, 217 U. S. 189, 54 S. Ct. 725, 54 L. Ed. 725 (1910):

"* * * But the Constitution does not require a disregard of the mode of ownership,—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. *It deals with persons, not with tracts of land. And the question is, What has the owner lost? not, What has the taker gained?* * * *" (Italics ours.) (p. 195.)

Accordingly, we contend that the constitutional right of compensation is not limited solely to compensation for the property taken, but encompasses also the owner's loss.

The third and last contention made by the government in support of its position is stated by its counsel as follows:

"The distinction made below between fee takings and the taking of a temporary interest is that what was taken here was not merely the property, but the right to use occupied property. This overlooks the fact that in all cases denying recovery for moving costs where the fee was taken the property was also occupied. Otherwise there would have been no occasion for claiming such expenses. Furthermore, the attempted distinction overlooks the principle that the compensation which the Government must pay for property which it condemns is the fair cash market value as between a willing buyer and a willing seller. * * *" (Brief for United States, p. 14.)

It is true that in the cases where the government took the fee the land was also occupied, but by the taking of the fee the government terminated the occupancy and the right to occupancy. It did not merely interrupt such right, as it has done in the instant case. It is also true that the government's obligation *when it buys property* is limited to hypothetical fair cash market value,[10] but in this case it has not bought the property, nor paid for it. Here it has only taken the use and occupancy of the owner for a temporary period, and the case is, therefore, one "similar in effect to actions in ejectment", where the taker, though defeated, cannot be evicted (4 Ct. Cl., *supra*, p. 249), and where the measure of damages applicable is that adopted in actions for mesne profits. (2 Ct. Cl., *supra*, 415-416.) The application of this rule, when fair rental value does not equal the owner's loss, compels and requires a consideration of all the damages suffered by the owner, otherwise he cannot be made whole.

It is, therefore, submitted that the respondent was entitled to have considered by the jury, in the assessment of rental value, all costs incurred by it in relinquishing its use and occupancy of the property.

2. As pertinent evidence of the diminution of the value of the use of the property during the period of governmental occupancy.

When it is said that the rental value of property temporarily taken should encompass all losses suffered by the owner, it is, in effect, meant that he is to be thereby compensated for the loss or diminution

[10]Bonbright op. cit., Vol. I, pp. 414-417.

of the value in use of the property and, of course, this diminution of the value in use can only be arrived at by a consideration of the costs incurred by the owner as a direct result of the deprivation of the use to which he was devoting his property. Hence, we urge that the respondent has the right to have submitted to the jury for consideration the expenses incurred in relinquishing its property.

The rule on diminution of value is generally stated as follows:

> "* * * Upon the authority of that decision we hold that where injury to real property is temporary, the measure of damages, if the property be rented or held for rent, is the diminution in its rental value during the continuance of the injury; *but, if it be occupied by the owner, it is the diminution in the value of the use of the property during that period, and that this rule applies in measuring damages arising from the temporary appropriation of real property.* * * *" (Italics ours.)
>
> *City of Norwood v. Sheen*, 126 Ohio St. 482, 494, 186 N.E. 102, 87 A.L.R. 1375 (1933).

The practical application of the rule to cases, like the one at bar, where *business property* is occupied by the owner is illustrated by the case of *Vincent v. N. Y. N. H. & H. R. Co.*, 77 Conn. 431, 59 Atl. 491 (1904). There the temporary cutting off of access to business property occupied and used by the owner was interpreted as a temporary "taking" of the property, and the Court held that the measure of damages for this taking was not the mere rental value, for the period of the interrupted access, but the reasonable value of the use of the premises to the owner; and held

further that, in determining the diminution of value in use, there should be considered all expenses directly resulting from the deprivation of use, and, in so holding, the Court stated:

> "If plaintiffs had used these premises merely as a place of residence or for the purpose of renting them, their loss as owners of property so used or rented would probably be fairly measured by the market rental value, or the diminution in such rental value, during the times they were so deprived of access. But where premises are used for manufacturing or business purposes and have been constructed for or adapted to such use, and for that purpose have been furnished with expensive fixtures, machinery and appliances, and a permanent and profitable business has been established at that place, compensation for the diminution in the market value of the premises, or in the mere rental value during the period of interrupted access, is not just compensation for the injury caused by temporarily depriving the owner of the right of access. *When the owner is making such use of the land, it is that use of which he is temporarily deprived, and for the loss or injury to which he is entitled to compensation.* (Italics ours). * * *; it might be unjust to hold the defendant liable for the loss or expense incurred by plaintiffs in continuing to conduct their business in the manner they did; and it might be equally unjust to allow the plaintiffs only the market rental value of the premises during the period of the interrupted access, as compensation for the injury which they must necessarily have sustained either by suspending business entirely during that period, or by using the premises in their impaired condition as well as they could or by moving their business to some

other place. The law does not point out the particular course which the plaintiffs should have pursued, but it does require that their conduct should have been reasonable, both in protecting themselves from injury and in diminishing the loss for which defendant might be liable. *The reasonable value of the use of the premises to the plaintiffs for the purposes of the business for which they were using them, is the value for the diminution of which, caused by such temporary interruption of access, the plaintiffs are entitled to compensation.*

"In determining the diminution of such value, the court should consider the reasonable necessary loss to the plaintiffs in their said business, caused by such interruption of access, including actual loss of trade and loss of profits necessarily caused thereby, *and the reasonably necessary additional labor and expense required to prevent further such loss.* * * *" (442-3) (Italics ours.)

The expenditures necessarily and reasonably made by the owner of property in protecting himself against loss when his right of use and occupancy is interrupted are, of necessity, reflected in the diminution of value in use to him of the property. Whether the expenditures were necessary and reasonable and result directly from the taking will have to be judged in the light of the circumstances under which the property was taken. The expenditures made by the respondent herein may be termed unusual, but they were the direct and proximate result of an unusual and extraordinary act of condemnation. The owner was required to vacate forthwith, surrender the premises in fit condition for the government's occupancy, and was told that the

property might be returned to it at the end of one year or retained for further terms of a year, all this at the government's option. That the usual fiction ordinarily assumed in customary condemnation proceedings, of a "willing seller" and a "willing buyer" and market value frozen as of the date of the taking, may not be assumed here is evident from the mere statement of the facts under which the fictional seller and buyer are supposed to negotiate and bargain. It follows, therefore, that it is not the value of the occupancy to others that controls here, but the value in use or loss thereof to the owner.

C. MERE DIFFICULTY IN ASCERTAINING THE AMOUNT OF COMPENSATION TO BE AWARDED TO RESPONDENT IS NO GROUND FOR DENYING IT.

We are not dealing, here, with that class of cases which denies recovery for future profits or uncertain and speculative losses. The loss herein was immediate. It was sustained and complete even before the government took possession of the property.

The task imposed upon the trier of the facts, of weighing and determining the reasonableness and necessity of the expenditures made in order to arrive at a fair rental, does not present insurmountable difficulties. In *De Laval Steam Turbine Co. v. United States*, 70 Ct. Cl. 51 (affirmed in *De Laval Turbine Co. v. United States*, 284 U. S. 61, 52 S. Ct. 78, 76 L. Ed. 168 (1931)), it is disclosed that the De Laval company bound itself to manufacture and deliver to third parties turbine units for use in a number of vessels: the government requisitioned these contracts, and told the

De Laval company to continue the work for the benefit of the United States, but subject to the right of the United States to cancel the contracts prior to completion. The contracts were in effect, cancelled, and it was held that this cancellation was a "lawful act under the power of eminent domain". (*De Laval Co. v. United States*, 284 U. S. at page 71.) The Court of Claims denied recovery for profits that might have been earned had not the contracts been cancelled, but allowed for the extraordinary expenses incurred by the company as a result of the order of cancellation. The items involved in the award are described as follows, in the opinion of the Court of Claims (70 Ct. Cl. 59):

> "* * * As to all the contracts, plaintiff had all the drawings, jigs, gauges, and fixtures out and distributed for their manufacture, and when the orders to stop work came plaintiff had to move all these, as well as the parts from the tools, and endeavor to provide the shop with other work as soon as possible. This rendered useless the scheduling already done and required the rescheduling of work in the shop. The orders to stop work in conjunction with said schedule change caused confusion, congestion, idleness by machine operators, and machine tools, and interference with the efficiency of plaintiff's operations, and additional clerical work, the cost of which to plaintiff amounted to $30,000."

The many and disparate items of expense incurred by the De Laval company did not present an insurmountable obstacle to the determination of its "just compensation" and it seems to us, therefore, that the mere difficulty of ascertainment should not be a ground for denying respondent herein its compensation.

It should be noted that in the *De Laval* case the expenditures resulted from the cancellation of a contract which the company knew was subject to termination at the option of the government. In this case, the expenditures have resulted from a temporary taking of respondent's contract, and we submit that, in principle, there is no difference between the cases. In one case, compensation was given because of a loss that would not have occurred except for the cancellation of the contract, and, by the same token, it is just that in the present cause losses which would not have been incurred except for the temporary taking of respondent's property rights should be considered in awarding compensation.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the measure of compensation to which respondent is entitled under the Fifth Amendment is not fixed by the fair rental value of its property to others, but by the loss of the value in use thereof to respondent, which loss encompasses a consideration of all expenditures necessarily resulting from the temporary taking.

Dated, San Francisco, California,
November 6, 1944.

Respectfully submitted,

PHILIP S. EHRLICH,
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SUPREME COURT OF THE UNITED STATES.

No. 76.—October Term, 1944.

The United States of America, Petitioner, *vs.* General Motors Corporation.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 8, 1945.]

Mr. Justice Roberts delivered the opinion of the Court.

This case is one of first impression in this court. It presents a question on which the decisions of federal courts are in conflict.[1] The problem involved is the ascertainment of the just compensation required by the Fifth Amendment of the Constitution, where, in the exercise of the power of eminent domain, temporary occupancy of a portion of a leased building is taken from a tenant who holds under a long term lease.

Section 201 of Tit. II of the Second War Powers Act of March 27, 1942,[2] provides, in part, that the Secretary of War may cause proceedings to be instituted, in any court having jurisdiction, to acquire, by condemnation, any real property, temporary use thereof, or other interest therein which shall be deemed necessary for military or other war purposes. The Act provides further that, on or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, or improved.

In 1928 the respondent leased a one story warehouse building in Chicago for a term of twenty years, for the storage and distribution of automobile parts, and fitted the premises for this use. In 1942 the United States became sub-tenants of a portion of the floor space in the building. There remained in the possession of the respondent some 93,000 square feet. In the spring of 1942

[1] Compare with the decision below, 140 F. 2d 873, Gershon Bros. Co. v. United States, 284 Fed. 849; National Laboratory & Supply Co. v. United States, 275 Fed. 218; United States v. Entire Fifth Floor, 54 F. Supp. 258; United States v. Improved Premises, 54 F. Supp. 469; United States v. Certain Parcels of Land, 54 F. Supp. 561; United States v. 0.64 Acres of Land, 54 F. Supp. 562; United States v. Building Known as 651 Brannan Street, 55 F. Supp. 667; Wm. Wrigley Jr. Co. v. United States, 75 Ct. Cls. 569; Howard Co. v. United States, 81 Ct. Cls. 646.

[2] c. 199, 56 Stat. 176, 177, 50 U. S. C. App. § 632.

the Secretary of War requested the Attorney General to institute proceedings for condemnation of the occupancy of the remaining space for a term ending June 30, 1943. Pursuant to the request, the United States, June 8, 1942, filed a petition in the District Court for an order condemning such temporary use and granting the Government the right of immediate possession, use, and improvement for military purposes. On the same day the court entered an order declaring the property condemned for a term ending June 30, 1943, and granting the United States the right of immediate possession. The order was served on the respondent and shortly thereafter it began removing its personal property from the area and dismantling and demolishing bins and fixtures, so that the space was available for government use by June 19.

At the trial for the ascertainment of the compensation due the respondent, the attorney for the Government, after proving the authority for the taking, called a real-estate expert who gave his opinion that the fair rental value of the space was 35 cents per year per square foot. The Government then rested.

The respondent called expert witnesses who testified that, in their opinion, the fair rental value was 43 cents per square foot, and a witness was permitted to testify that the rent paid by the respondent to its landlord had varied during the years 1940 to 1942, inclusive, from 41.9 to 43.24 cents.

The respondent then offered to prove various items of cost caused by removal of the contents. These consisted, *inter alia*, of salaries of employes engaged in the work, compensation due employes put out of work by the removal, wages of janitors and watchmen for the protection of the building during the moving, the cost of shipping the contents of the building to other points, compensation to executives and employes whose time was required in connection with the moving of the property, freight and haulage charges, rental of storage space for articles moved out, the value of the bin equipment destroyed and the estimated original cost of the installation of fixed equipment completely lost as a result of the dismantling of the area. The court sustained an objection to the offer. The jury awarded compensation in a lump sum at a rate of approximately 40 cents per square foot for the term of one year.[3]

[3] After judgment had been entered on the verdicts, the court, on the Government's motion, opened the judgment and permitted the Government to amend its petition for condemnation to describe the interest taken as "a term for years . . . expiring June 30, 1943, renewable for additional yearly

The respondent appealed to the Circuit Court of Appeals, assigning as error the refusal of its offer of proof. That court might have sustained the District Court's ruling on the ground that respondent was not entitled to prove certain of the expenditures and losses in question as independent items of damages additional to the value of the interest taken by condemnation. The court, however, considering substance rather than form, by a vote of 2 to 1, reversed the judgment, holding that items of actual loss which were the direct and necessary result of the respondent's exclusion from the leased area might be proved, not as independent items but as elements to be considered in arriving at the sum which would be just compensation for the interest which the Government condemned. The cause was remanded for trial in accordance with the ruling of the Circuit Court of Appeals. We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case. The correctness of the decision of the court below depends upon the scope and meaning of the constitutional provision: "nor shall private property be taken for public use, without just compensation", which conditions the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it needs.

The critical terms are "property," "taken" and "just compensation". It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.[4] When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers

periods thereafter . . . at the election of the Secretary of War", on specified notice of intent so to renew. The court then entered a new judgment awarding the amount of the verdict to respondent and retaining jurisdiction for the ascertainment of further compensation for damage to the property, if any, beyond ordinary wear and tear, due to the Government's occupancy. We do not understand that these facts alter the question before us. The case now presented involves only the original taking for one year. If, on remand, the case be treated as involving the Government's option of renewal, the additional value of that interest must be included in the compensation awarded. We express no opinion as to the Government's power to condemn service, such as the furnishing of heat [illegible] ght.

[4] Lewis, Eminent Domain, 3d Ed., §§ 63, 64.

term the individual's "interest" in the thing in question. That interest may comprise the group of rights for which the shorthand term is "a fee simple" or it may be the interest known as an "estate or tenancy for years", as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess.

In its primary meaning, the term "taken" would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.[5]

But it is to be observed that whether the sovereign substitutes itself as occupant in place of the former owner, or destroys all his existing rights in the subject matter, the Fifth Amendment concerns itself solely with the "property", i. e., with the owner's relation as such to the physical thing and not with other collateral interests which may be incident to his ownership.

In the light of these principles it has been held that the compensation to be paid is the value of the interest taken. Only in the sense that he is to receive such value is it true that the owner must be put in as good position pecuniarily as if his property had not been taken. In the ordinary case, for want of a better standard, market value, so-called, is the criterion of that value. In some cases this criterion cannot be used either because the interest condemned has no market value or because, in the circumstances, market value furnishes an inappropriate measure of actual value.

In the trial of this case the parties presented evidence of the market value of the occupancy of bare floor space for the term taken. The respondent's offer to prove additional items for which it claimed compensation was overruled. The award was therefore limited to the market value of the occupancy of a vacant building. The question is whether any other element of value inhered in the interest taken.

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[5] See, e. g., United States v. Welch, 217 U. S. 333; Richards v. Washington Terminal Co., 233 U. S. 546.

The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. No doubt all these elements would be considered by an owner in determining whether, and at what price, to sell. No doubt, therefore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered. But the courts have generally held that they are not to be reckoned as part of the compensation for the fee taken by the Government.[6] We are not to be taken as departing from the rule they have laid down, which we think sound. Even where state constitutions command that compensation be made for property "taken or damaged" for public use, as many do, it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to those rights of ownership does not include losses to his business or other consequential damage.[7]

The question posed in this case then is, shall a different measure of compensation apply where that which is taken is a right of temporary occupancy of a building equipped for the condemnee's business, filled with his commodities, and presumably to be reoccupied and used, as before, to the end of the lease term on the termination of the Government's use? The right to occupy, for a day, a month, a year, or a series of years, in and of itself and without reference to the actual use, needs, or collateral arrangements of the occupier, has a value. The value of that interest is affected, of course, by the kind of building to be occupied, by its location, by its susceptibility to various uses, by its conveniences, or the reverse, and by many other factors which go to set the value of the occupancy. These were taken into consideration in fixing the market value of the floor space taken, as if that space were bare and in the market for rent.

While, as has been said, the Government's power to take for a short period, and to demand possession of the space taken freed of

[6] Bothwell *v.* United States, 254 U. S. 231; Mitchell *v.* United States, 267 U. S. 341; Mullen Benevolent Corp. *v.* United States, 290 U. S. 89; Orgel, Valuation under Eminent Domain, Chap. V, pp. 220-252.

[7] Orgel, *op. cit.*, p. 253.

all equipment or personal property therein, cannot be denied, three questions emerge which are not presented when what is taken is a fee interest in land. They are: 1. Is the long-term rental value the sole measure of the value of such short-term occupancy carved out of the long term? 2. If the taking necessitates the removal of personal property stored in the building in conformity to the normal use of such a building, is the necessary expense of the removal to be considered in computing compensation? 3. If a tenant's equipment and fixtures are taken or destroyed, or reduced in value, by the Government's action, must it compensate for the value thus taken or destroyed in addition to paying the rental value of the occupancy?

1. If the Government need only pay the long-term rental of an empty building for a temporary taking from the long-term tenant a way will have been found to defeat the Fifth Amendment's mandate for just compensation in all condemnations except those in which the contemplated public use requires the taking of the fee simple title. In any case where the Government may need private property, it can devise its condemnation so as to specify a term of a day, a month, or a year, with optional contingent renewal for indefinite periods, and with the certainty that it need pay the owner only the long term rental rate of an unoccupied building for the short term period, if the premises are already under lease or, if not, then a market rental for whatever minimum term it may choose to select, fixed according to the usual modes of arriving at rental rates. And this, though the owner may be damaged by the ouster ten, a score, or perhaps a hundred times the amount found due him as "fair rental value." In the present case the respondent offered to prove that the actual expense of moving its property exceeded $46,000, and the loss due to destruction and removal of fixtures and fixed equipment exceeded $31,000, in addition to its continuing liability to pay rent for the year of approximately $40,000; whereas the award was $38,597.86. If such a result be sustained we can see no limit to utilization of such a device; and, if there is none, the Amendment's guaranty becomes, not one of just compensation for what is taken, but an instrument of confiscation fictionalizing "just compensation" into some such concept as the common law idea of a peppercorn in the law of seizin or the later one of "value received" in that of contractual consideration. If the value to be paid in a case like the present is confined, as matter of law, to

the long term rental of bare space, the owner will not be secure, either in his rights of property, or in his right to just compensation as a substitute for it, when the Government takes it for the use and benefit of all. Here the use of a warehouse for a short time was taken. The property might have been the General Motors factory. Or several plants. Or a modest store or home. Whatever of property the citizen has the Government may take. When it takes the property, that is, the fee, the lease, whatever he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of "consequential damage" as that conception has been defined in such cases. Even so, the consequences often are harsh. For these whatever remedy may exist lies with Congress.

It is altogether another matter when the Government does not take his entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the "market rental value" for the use of the chips so cut off. This is neither the "taking" nor the "just compensation" the Fifth Amendment contemplates. The value of such an occupancy is to be ascertained, not by treating what is taken as an empty warehouse to be leased for a long term, but what would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier. The case should be retried on this principle. In so ruling we do not suggest that the long-term rental value may not be shown as bearing on the market rental value of the temporary occupancy taken. It may be evidence of the value of what is taken but it is not the criterion of value in such a case as this.

2. Some of the elements which would certainly and directly affect the market price agreed upon by a tenant and a sublessee in such an extraordinary and unusual transaction would be the reasonable cost of moving out the property stored and preparing the space for occupancy by the subtenant. That cost would include labor, materials, and transportation. And it might also include the storage of goods against their sale or the cost of their return to the leased premises. Such items may be proved, not as independent items of damage but to aid in the determination of what would be the usual—the market—price which would be asked and paid for

such temporary occupancy of the building then in use under a long term lease. The respondent offered detailed proof of amounts actually and necessarily paid for these purposes. We think that the proof should have been received for the purpose and with the limitation indicated.[8] Proof of such costs as affecting market value is to be distinguished from proof of value peculiar to the respondent, or the value of good-will or of injury to the business of the respondent which, in this case, as in the case of the condemnation of a fee, must be excluded from the reckoning.

3. For fixtures and permanent equipment destroyed or depreciated in value by the taking, the respondent is entitled to compensation. An owner's rights in these are no less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon erected. And it matters not whether they were taken over by the Government or destroyed, since, as has been said, destruction is tantamount to taking.[9] This is true whether the fixtures and equipment would be considered such as between vendor and vendee,[10] or as a tenant's trade fixtures.[11] In respect of them, the tenant whose occupancy is taken is entitled to compensation for destruction, damage or depreciation in value.[12] And since they are property distinct from the right of occupancy such compensation should be awarded not as part of but in addition to the value of the occupancy as such.

The judgment of the Circuit Court of Appeals, as modified by this opinion, is

Affirmed.

The CHIEF JUSTICE, Mr. Justice FRANKFURTER and Mr. Justice MURPHY took no part in the consideration or decision of this case.

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[8] Patterson v. City of Boston, 23 Pick. (Mass.) 425; Getz v. Phila. & Reading R. Co., 105 Pa. 547; Phila. & Reading R. Co. v. Getz, 113 Pa. 214; McMillin Ptg. Co. v. Pittsburgh C. & W. R. Co., 216 Pa. 504; North Coast R. Co. v. Kraft, 63 Wash. 250; National Laboratory & Supply Co. v. United States, 275 Fed. 218.

[9] *Supra*, Note 5.

[10] Jackson v. State of New York, 213 N. Y. 34.

[11] In re Block Bounded, etc., 122 N. Y. Supp. 321; In re Willcox, 151 N. Y. Supp. 141; Bales v. Wichita M. V. R. Co., 92 Kan. 771; In re Water Front, 219 N. Y. Supp. 353; Matter of City of New York, 256 N. Y. 236; In re Widening of Gratiot Ave., 294 Mich. 569; cf. Pause v. City of Atlanta, 98 Ga. 92.

[12] United States v. Seagren, 50 F. (2d) 333; In the Matter of the Application of the City of New York, 118 App. Div. (N. Y.) 865; City of St. Louis v. St. Louis I. M. & S. R. Co., 266 Mo. 694; People v. Ganahl Lumber Co., 75 P. 2d (Cal.) 1067; and cases cited in Note 11.

SUPREME COURT OF THE UNITED STATES.

No. 76.—October Term, 1944.

The United States of America, Petitioner, *vs.* General Motors Corporation.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 8, 1945.]

Mr. Justice Douglas, concurring in part.

I agree that respondent is entitled to compensation for fixtures and permanent equipment destroyed or depreciated in value by the taking. I likewise agree that respondent is entitled to a further increase in its award. The award granted is less than the rental which it is under a continuing obligation to pay the lessor. The United States is occupying the premises and paying about 40¢ a square foot while respondent continues to pay 42¢ to the landlord. In these special circumstances it is difficult to see how a lessee receives that just compensation to which he is entitled unless the United States pays the full rental. It would indeed be a novel rule of law which allowed the Government to oust a person from a portion of his leasehold, occupy the premises, but pay only a part of the rent, leaving the balance to be paid by him who though ousted holds the balance of the term. But I do not believe we should allow the cost of removing personal property from the premises to be reflected in the award. If this were a fee interest which was being condemned, we would exclude all such expenses from the award. Consequential losses or injuries resulting from the taking are not compensable under the Fifth Amendment. *Mitchell* v. *United States*, 267 U. S. 341; *United States* v. *Miller*, 317 U. S. 369, 376; *United States* v. *Powelson*, 319 U. S. 266, 281-283. It takes an Act of Congress to make them so. We should adhere to that rule. If we allow consequential damages to be shown here, I do not see how we can refuse such an offer of proof when a 10 year lease, a 99 year lease, or a fee interest is condemned. If cost of moving is relevant to market price in one case, I cannot say it is irrelevant in the other. And if one type of consequential damage is relevant to market price, I do not see

why almost any type may not be. If we allow the offer of proof in the present case, the result will be to let consequential damages in under a new guise. If we take that step we demonstrate that hard cases do indeed make bad law. We give the Constitution an interpretation which promises swollen verdicts which no Act of Congress can cure.

Mr. Justice BLACK joins in this opinion.